

DOCKET

No. 86-1461-CFX
Status: GRANTED

Title: Edward J. DeBartolo Corp., Petitioner
v.
Florida Gulf Coast Building and Construction Trades
Council and National Labor Relations Board

Docketed:
March 11, 1987

Court: United States Court of Appeals
for the Eleventh Circuit

Counsel for petitioner: Cohen, Lawrence M.

Counsel for respondent: Solicitor General, Gold, Laurence

Entry	Date	Note	Proceedings and Orders
1	Jan 27 1987		Application for extension of time to file petition and order granting same until March 11, 1987 (Powell, January 28, 1987).
2	Mar 11 1987	G	Petition for writ of certiorari filed.
4	Apr 3 1987		Order extending time to file response to petition until May 13, 1987.
5	Apr 13 1987		Brief amicus curiae of American Retail Federation filed.
6	May 12 1987		Memorandum of respondent NLRB filed.
7	May 13 1987		Brief amicus curiae of Chamber of Commerce of the US filed.
8	May 13 1987		Brief of respondent FL Gulf Coast Bldg. Council in opposition filed.
9	May 13 1987		Brief amicus curiae of International Council of Shopping Centers, Inc. filed.
10	May 19 1987		DISTRIBUTED. June 4, 1987
11	Jun 8 1987		Petition GRANTED. *****
13	Jul 9 1987		Order extending time to file brief of petitioner on the merits until August 22, 1987.
14	Aug 3 1987		Joint appendix filed.
15	Aug 14 1987		Record filed.
16	Aug 21 1987		Brief of petitioner Edward J. DeBartolo Corp. filed.
17	Aug 21 1987		Brief amicus curiae of Chamber of Commerce of the US filed.
18	Aug 21 1987		Brief of respondent NLRB in support of petition filed.
19	Aug 22 1987		Brief amicus curiae of International Council of Shopping Centers filed.
20	Aug 22 1987		Brief amicus curiae of American Retail Federation filed.
31	Aug 26 1987		Applicatin of respondent FL Gulf Coast Building and Trades Council for leave to file respondents brief on the
32	Aug 26 1987		merits in excess of the page limitation filed (A-351), and order denying same by O'Connor, J., on 11/2/87.
22	Aug 28 1987	G	Motion of the Solicitor General for divided argument filed.
23	Sep 21 1987		Motion of the Solicitor General for divided argument GRANTED. to be divided as follows: 20 minutes for petitioner and 10 minutes for the Solicitor General.
25	Sep 21 1987		Order extending time to file brief of respondent on the merits until October 24, 1987.
26	Oct 17 1987		Order further extending time to file brief of respondent

Entry	Date	Note	Proceedings and Orders
27	Oct 30 1987		on the merits until October 30, 1987. Order further extending time to file brief of respondent on the merits until November 4, 1987.
28	Oct 30 1987		Brief amicus curiae of ACLU Foundation filed.
29	Nov 4 1987		Order further extending time to file brief of respondent on the merits until November 6, 1987.
30	Nov 6 1987		Brief of respondent FL Gulf Coast Bldg. and Construction Trades Council filed.
33	Nov 20 1987		CIRCULATED.
34	Nov 23 1987		SET FOR ARGUMENT. Wednesday, January 20, 1988. (3rd case).
35	Jan 6 1988	X	Reply brief of petitioner Edward J. Debartolo Copr. filed.
36	Jan 7 1988	X	Reply brief of respondent NLRB supporting petitioner filed.

**PETITION
FOR WRIT OF
CERTIORARI**

86 - 1461

No.

Supreme Court, U.S.
FILED

MAR 11 1987

JOSEPH F. SPANIO, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1986

THE EDWARD J. DEBARTOLO CORP.,

Petitioner,

v.

FLORIDA GULF COAST BUILDING AND
CONSTRUCTION TRADES COUNCIL,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LAWRENCE M. COHEN

MARTIN K. DENIS

FOX AND GROVE, CHARTERED

233 South Wacker Drive

Sears Tower - Suite 7818

Chicago, Illinois 60606

(312) 876-0500

Attorneys for Petitioner

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR
HARD COPY AT THE TIME OF FILMING.
IF AND WHEN A BETTER COPY CAN BE
OBTAINED, A NEW FICHE WILL BE
ISSUED.

QUESTIONS PRESENTED

1. Whether the secondary boycott prohibitions of the National Labor Relations Act, 29 U.S.C. §158(b)(4), encompass only picketing, and exclude handbilling and all other forms of labor publicity.

2. Whether, if handbilling and other labor publicity are encompassed by the secondary boycott prohibitions of the Act, the prohibitions contravene the First Amendment to the United States Constitution.

TABLE OF CONTENTS

QUESTIONS PRESENTED	Page i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE FACTS	3
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	13

TABLE OF AUTHORITIES

<i>Amalgamated Food Employees Union, Local 490 v. Logan Valley Plaza, Inc.</i> , 391 U.S. 308 (1968)	Page 8-9
<i>American Federation of Television and Radio Artists (Great Western Broadcasting Corp.)</i> , 134 NLRB 1617 (1961), <i>rev'd</i> , 310 F.2d 591 (9th Cir. 1962), <i>supp. dec.</i> , 150 NLRB 467 (1964), <i>aff'd.</i> , 356 F.2d 434 (9th Cir. 1966)	7
<i>Boxhorn's Big Muskego Gun Club, Inc. v. Electrical Workers Local 497</i> , 798 F.2d 1016 (7th Cir. 1986)	5, 8-9
<i>Colautti v. Franklin</i> , 439 U.S. 379 (1979)	7
<i>Edward J. DeBartolo Corp. v. NLRB</i> , 463 U.S. 147 (1983)	<i>Passim</i>
<i>Edward J. DeBartolo Corp. v. NLRB</i> , 662 F.2d 264 (4th Cir. 1981)	3
<i>Florida Gulf Coast Building and Construction Trades Council v. NLRB</i> , 796 F.2d 1328 (11th Cir. 1986)	2
<i>Florida Gulf Coast Building Trades Council</i> , 252 NLRB 702 (1980)	2-3
<i>Florida Gulf Coast Building Trades Council</i> , 273 NLRB No. 172 (1985)	2
<i>Ford Motor Co. v. NLRB</i> , 441 U.S. 488 (1979) ...	8
<i>General Electric Co. v. Gilbert</i> , 429 U.S. 125 (1976)	7-8
<i>Hoffman v. Cement Masons Union, Local 337</i> , 468 F.2d 1187 (9th Cir. 1972)	5
<i>Hospital and Service Employees Union, Local 399 v. NLRB</i> , 743 F.2d 1417 (9th Cir. 1984)	9

	<i>Page</i>
<i>International Brotherhood of Electrical Workers, Local 501 v. NLRB</i> , 341 U.S. 694 (1951)	10
<i>International Brotherhood of Teamsters, Local 537 (Lohman Sales Co.)</i> , 132 NLRB 901 (1961)	7
<i>International Longshoremen's Ass'n v. Allied International, Inc.</i> , 456 U.S. 212 (1982)	10
<i>Local Union No. 48, Sheet Metal Workers International Ass'n v. Hardy Corp.</i> , 332 F.2d 682 (5th Cir. 1964)	5
<i>Local No. 662, Radio and Television Engineers (Middle South Broadcasting Co.)</i> , 133 NLRB 1698 (1961)	7
<i>NAACP v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982)	5, 10
<i>NLRB v. Denver Building & Construction Trades Council</i> , 341 U.S. 675 (1951)	6
<i>NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 703 ("Tree Fruits")</i> , 377 U.S. 58 (1964)	4-5
<i>NLRB v. Local International Union of Operating Engineers</i> , 315 F.2d 695 (3d Cir. 1963)	5
<i>NLRB v. Local Union No. 3, International Brotherhood of Electrical Workers</i> , 477 F.2d 260 (2d Cir.), cert. denied, 414 U.S. 1065 (1973)	10
<i>NLRB v. Retail Store Employees Local 1001 (Safeco Title Insurance Co.)</i> , 447 U.S. 607 (1980)	4-5, 10
<i>NLRB v. Servette, Inc.</i> , 377 U.S. 46 (1964)	6
<i>Pet, Inc. v. NLRB</i> , 641 F.2d 545 (8th Cir. 1981)	9
<i>San Diego Building Trades Council v. Garmon</i> , 359 U.S. 236 (1959)	8

	<i>Page</i>
<i>Smitley v. NLRB</i> , 327 F.2d 351 (9th Cir. 1984)	6
<i>Solein v. Carpenters District Council</i> , 623 F. Supp. 597 (E.D. Mo. 1985)	5
<i>Southeastern Community College v. Davis</i> , 442 U.S. 397 (1979)	7
 STATUTES	
28 U.S.C. § 1254(1)	2
29 U.S.C. § 151 <i>et seq.</i> (National Labor Relations Act)	<i>Passim</i>
 MISCELLANEOUS	
<i>Cox, Strikers, Picketing and the Constitution</i> , 4 Vand. L. Rev. 574 (1951)	10
<i>Zimmerman, The Changing Arsenal of Economic Weapons: Consequences for Section 8(b)(4), The Board and The Courts</i> , reprinted at 117 Daily Lab. Rep. D-1 (June 18, 1981)	10-11
<i>Sevrin, Interview with Lane Kirkland</i> , N.Y. Times, Nov. 16, 1981, at 12, col. 4	12

No.

In The
Supreme Court of the United States
October Term, 1986

THE EDWARD J. DEBARTOLO CORP.,

Petitioner,

v.

FLORIDA GULF COAST BUILDING AND
CONSTRUCTION TRADES COUNCIL,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner Edward J. DeBartolo Corporation ("DeBartolo")¹ respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on August 11, 1986.

¹ A list of DeBartolo's parent companies, affiliates and subsidiaries (excluding wholly-owned subsidiaries) is appended hereto as Appendix C.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 796 F.2d 1346, *sub nom. Florida Gulf Coast Building and Construction Trades v. National Labor Relations Board*. Appendix A., pp. 1A-37A. The supplemental decision and order of the National Labor Relations Board is reported at 273 NLRB No. 172 (1985), *sub nom. Florida Gulf Building Trades Council*. Appendix A, pp. 38A-46A. This case was previously before this Court. 463 U.S. 147 (1983) ("*DeBartolo I*"). That decision was preceded by an opinion of the Court of Appeals for the Fourth Circuit, 662 F.2d 264 (4th Cir. 1981), and the initial decision of the National Labor Relations Board, 252 NLRB 702 (1980).

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit, granting the petition for review filed by the Florida Gulf Coast Building and Construction Trades Council, AFL-CIO (the "Union") and denying the petition for enforcement filed by the National Labor Relations Board (the "Board"), was issued on August 11, 1986. Appendix A, pp. 47A-48A. A timely petition for rehearing was denied on November 12, 1986. Appendix A, pp. 49A-50A.

On January 28, 1987, Mr. Justice Powell ordered that the time for filing this petition for writ of certiorari be extended to and including March 11, 1987. Appendix A, p. 51A.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.* (the "Act"), and the First Amendment to the United States Constitution are set forth in Appendix B.

STATEMENT OF THE FACTS

The facts of the case are undisputed and are detailed in the opinions of this Court in *DeBartolo I* (463 U.S. at 148-52) and the court below (Appendix A, pp. 1A-3A). Briefly summarized, they are as follows:

DeBartolo owns and operates the East Lake Square Mall, a large shopping center located in Tampa, Florida. One of the Mall's approximately eighty-five tenants is the H.J. Wilson Company, Inc. ("Wilson's"). The primary labor dispute in this case is between High Construction Company, a building contractor engaged to construct a new store for Wilson's at the Mall, and the Union.

To publicize High's alleged payment of substandard wages and benefits, the Union handbilled at all the entrances to the mall while the Wilson's store was under construction. The handbill, which is reproduced at 463 U.S. at 150 n. 3, urged a total consumer boycott of the Mall and all its tenants. There was no picketing or patrolling, and the handbilling was conducted in a peaceful and orderly manner.

DeBartolo filed unfair labor practice charges alleging that the Union was engaging in a secondary boycott in violation of Section 8(b)(4) of the Act. Although the Board's General Counsel issued a complaint, the Board dismissed the complaint on the ground that the handbilling was protected by the publicity proviso exception to Section 8(b)(4). 252 NLRB 702 (1980). The Court of Appeals for the Fourth Circuit affirmed (662 F.2d 264 (4th Cir. 1981)), and, in *DeBartolo I*, this Court reversed. The Court decided only that the publicity proviso did not sanction the handbilling. The case was remanded to address the open issues of whether the handbilling was proscribed by the Act and, if so, whether the Act was then constitutional. 463 U.S. at 153, 157-58.

On remand, the Board concluded that the Union had "engaged in conduct coercive within the meaning of Section 8(b)(4)(ii)" which Congress had "intended to proscribe," and that "this proscription accords with the Constitution." Appendix A, pp. 42A-43A. The Eleventh Circuit disagreed. In a *per curiam* decision by a quorum of the panel (Appendix A, p. 1A), that court determined (1) that, if the Act was construed to prohibit handbilling, "serious constitutional issues will arise" (*id.* at p. 13A); (2) there was "no affirmative intention of Congress clearly expressed to prohibit [handbilling or other] nonpicketing labor publicity" (*id.* at p. 37A); and (3) that absent such an intent, the Act only prohibited picketing (*id.*). The Board then sought rehearing, arguing, *inter alia*, that the panel decision ignored "the congressional purpose underlying the secondary boycott prohibitions," was "directly contrary to . . . *NLRB v. Retail Store Employees Local 1001 (Safeco Title Insurance Co.)*, 447 U.S. 607 (1980)," and that rehearing in banc was warranted "because the proper resolution of these issues is of exceptional importance to the enforcement of the secondary boycott provisions of the National Labor Relations Act." Board Pet. for Rehearing in the Court of Appeals, pp. 5, 6. The petition for rehearing was denied, without opinion, by the Court of Appeals. Appendix A, p. 49A.

REASONS FOR GRANTING THE WRIT

A. The Board correctly argued that a proper resolution of the question presented "is of exceptional importance to the enforcement" of the Act. Since the enactment of the Act's secondary boycott prohibitions in 1959, neutral employers have been protected from all secondary activity, regardless of whether such activity involved picketing, handbilling or other publicity. The "prohibition of § 8(b)(4)," as the Court indicated in *NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 703 ("Tree Fruits")*, 377 U.S. 58, 68 (1964), was "keyed to the coer-

cive nature of the nature of the conduct, whether it be by picketing or otherwise" (emphasis added).² The decision below removes this critical protection. Unions can enmesh neutral employers in a multitude of unrelated labor disputes simply by utilizing conduct other than picketing. This result contradicts Congress's underlying "concern that motivates all of § 8(b)(4): 'shielding unoffending employers and others from pressures not their own.'" *DeBartolo*

²See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982), where the Court noted that "[s]econdary boycotts and b)8(picketing by labor unions may be prohibited . . ." (emphasis added); and *Safeco*, 447 U.S. at 607, where the Court, as the Seventh Circuit recently recognized, similarly indicated that "handbilling . . . is coercive or restraining under § 8(b)(4)(ii) when designed to close the whole business. See also *Soft Drink Workers v. NLRB*, 657 F.2d 1252, 1263-68 (D.C. Cir. 1980)" *Bozhorn's Big Muskego Gun Club, Inc. v. Electrical Workers Local 494*, 798 F.2d 1016, 1019 (7th Cir. 1986). See also *Solein v. Carpenters District Council*, 623 F. Supp. 597, 600 (E.D. Mo. 1985), where the court, relying on *Hoffman v. Cement Masons Union, Local 337*, 468 F.2d 1187 (9th Cir. 1972), rejected the argument that "the peaceful and orderly distribution of handbills, which informed consumers of substandard wages and construction flaws, cannot be considered a violation of Section 8(b)."

"Coercion" has repeatedly been recognized to be a "word of art" which includes "non-judicial acts of compelling or restraining nature, applied by way of concerted self-help consisting of a strike, picketing or other economic retaliation or pressure in a background of a labor dispute." *Local Union No. 48, Sheet Metal Workers International Ass'n, v. Hardy Corp.*, 332 F.2d 682, 686 (5th Cir. 1964) (emphasis added). The statutory prohibition is "not restricted to use of force or violence as a means of bringing pressure against the secondary employer, but includes economic sanctions also." *NLRB v. Local International Union of Operating Engineers*, 315 F.2d 695, 697 (3d Cir. 1963). As the Court recognized in *Safeco*, coercion thus encompasses all conduct, peaceful or otherwise, picketing or otherwise, that "predicably encourages consumers to boycott a secondary business" or which "reasonably can be expected to threaten neutral parties with ruin or substantial loss" 447 U.S. at 614, 616.

I, 463 U.S. at 156, citing *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951). As a unanimous Court further emphasized in *DeBartolo I*, "if Congress had intended all peaceful, truthful handbilling that informs the public of a primary dispute" to be protected—the very conclusion reached here by the Court of Appeals—"the statute would not have contained a distribution requirement [in the publicity proviso]." *Id.* Indeed, there would have been no need for the proviso.

The proviso is, as *NLRB v. Servette, Inc.*, 377 U.S. 46, 55 (1964), teaches and *DeBartolo I* (463 U.S. at 155) confirms, an "exception" to the Act's secondary boycott prohibitions. The proviso, like similar provisos elsewhere in the Act,³ must be an exception to something. As a result, *DeBartolo I* recognized that "[t]he only publicity exempted from the [Act's secondary boycott] prohibition" is the publicity sanctioned by the proviso (*id.* at 155; emphasis added), not, as the court below concluded, all "nonpicketing labor publicity" (Appendix A, p. 5A).

DeBartolo I did not ignore the constitutional concern that underlies the decision below. The Court observed that, although that concern may require "the statutory language to be construed narrowly . . . [i]t does not . . . [mean that] the statutory language is to be deprived of substantial practical effect." *Id.* at 157 n. 10. Depriving the proviso of any "substantial practical effect," is, however, as the Board observed in its petition for rehearing below (p. 9), the precise result of the Court of Appeals's decision. The proviso has simply been construed as surplusage. Not only the proviso's distribution requirement, but the entire

³ See, e.g., the interpretation of Section 8(b)(7)(C), Section 8(b)(4)'s companion section, in *Smitley v. NLRB*, 327 F.2d 351, 353 (9th Cir. 1964) ("Unless that proviso [Section 8(b)(7)(C)] refers to picketing having as 'an object' either recognition or organization, it can have no meaning, for it would not be an exception or proviso to anything.").

proviso, has been "strip[ed] . . . of its limiting effect." *Id.* at 156. This conclusion disregards the well-established principle that, in interpreting a statute, each part must be given meaning "so as not to render one part inoperative." *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

The decision below cannot be reconciled with either *DeBartolo I*, the language of Section 8(b)(4) or the interpretation heretofore given to that Section by this Court and the Board.⁴ Review is warranted, therefore, to avoid undesirable disharmony in our national labor policy.

B. The Eleventh Circuit's decision also cannot be

⁴ The Board has long adopted the same position that it reached in the present case: handbilling falls within the ambit of the conduct prohibited by Section 8(b)(4) of the Act. In *American Federation of Television and Radio Artists (Great Western Broadcasting Corp.)*, 134 NLRB 1617 (1961), *rev'd*, 310 F.2d 591 (9th Cir. 1962), *supp. dec.*, 150 NLRB 467, 470-72 (1964), *aff'd.*, 356 F.2d 434 (9th Cir. 1966), for example, the Board on remand considered that question and concluded that, since the union was advocating a total boycott of the secondary employers rather than a single product boycott, "such conduct clearly constitute[d] threats, restraint, or coercion within the meaning of Section 8(b)(4)(ii) of the Act." 150 NLRB at 471. See also *International Brotherhood of Teamsters, Local 537 (Lo'uman Sales Co.)*, 132 NLRB 901, 904 (1961) ("While such conduct otherwise might constitute restraint and coercion . . . Respondent's handbilling in this case was protected by the proviso to Section 8(b)(4)."); *Local No. 662, Radio and Television Engineers (Middle South Broadcasting Co.)*, 133 NLRB 1698, 1705 (1961) ("[U]nless protected by the proviso to Section 8(b)(4), Respondent's circulation and distribution of the 'Do Not Patronize' leaflets urging a consumer boycott of secondary employers still advertising on WOGA, would constitute 'restraint or coercion' within the meaning of Section 8(b)(4)(ii)(B) and a violation of that Section.").

The Board's prohibition of secondary handbilling represents both a "longstanding" (*Southeastern Community College v. Davis*, 442 U.S. 397, 411 n. 11 (1979)) and "contemporaneous interpretation" (*General Electric Co. v. Gilbert*, 429 U.S.

(Footnote continued on the following page)

reconciled with the Seventh Circuit's decision in *Bozhorn's*. Although that Circuit subsequently stated, in an opinion on a petition for rehearing (798 F.2d at 1023-24), that it did not have to resolve the pure handbilling controversy here at issue, it did note its significant disagreement with the decision below. As the Seventh Circuit observed, "[i]t is not altogether plain . . . that constitutional overtones can be employed to narrow the statute's scope to picketing and nothing but, as the Eleventh Circuit has done If the statute is limited to picketing, the publicity proviso is a pointless gesture, exempting a subset of publicity none of which is covered to begin with. We are reluctant to treat the publicity proviso as so much blather." 798 F.2d at 1024.

The Seventh Circuit additionally did not disavow or even modify those portions of its prior opinion which clearly conflicted with the decision below. In that previous opinion, the Seventh Circuit deemed handbilling to be coercive under Section 8(b)(4) where, as in this case, it was "designed to close the whole business." *Id.* at 1019. "On-the-spot handbilling," like "picketing" and "patrolling," the court declared, has "been viewed as a particular effective . . . form of pressure. People may be induced by the presence of others to act in a way that they otherwise would not, and the effect (the restraint or coercion) on the secondary employer will be greater." *Id.* at 1020. See, to the same effect, *Amalgamated Food Employees Union*,

4 (Continued)

125, 142 (1976)) of the 1959 amendments to the Act. It constitutes a "construction of the statute . . . [that is] reasonably defensible" *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979). The Board's view was entitled, therefore, to deference. Congress, after all, "has entrusted administration of the labor policy for the Nation to a centralized administrative agency . . . equipped with its specialized knowledge and cumulative experience." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 242 (1959).

Local 490 v. Logan Valley Plaza, Inc., 391 U.S. 308, 315-16 (1968). While, like the court below, the Seventh Circuit was "chary" of "constitutional hurdles," it recognized that "[c]ourts may not turn back statutes to keep them out of the [constitutional] danger zone." *Bozhorn's*, 798 F.2d at 1021. This is an axiom which the court below failed to heed.

The conflict between the decision below and *Bozhorn's*, as well as the long line of Board and court decisions which have heretofore uniformly held that the Act encompassed handbilling (see nn. 1 and 3, *supra*), requires resolution by this Court. This Court granted certiorari in *DeBartolo I* to resolve the conflict between the Fourth Circuit's decision and *Pet, Inc. v. NLRB*, 641 F.2d 545 (4th Cir. 1981). 463 U.S. at 153. A similar conflict warrants granting the present petition.

C. Granting the instant petition would enable the Court to provide guidance on the "novel and complex" constitutional issues presented by this case. *Hospital and Service Employees Union, Local 399 v. NLRB*, 743 F.2d 1417, 1428 (9th Cir. 1984).⁵ These "serious constitutional questions," as previously noted, led the Eleventh Circuit to construe the statute to exclude non-picketing labor publicity. Appendix A, p. 13A. *Bozhorn's*, however, while cognizant of the same "hard constitutional questions," concluded that, although "handbills are speech . . . the process of picketing and handbilling is more than speech. It is a combination of speech and economic or social pressure, an implied threat of ostracism or injury (economic or physical) to those who take the dare The Supreme Court

⁵ As the Ninth Circuit noted, the application of Section 8(b)(4) to handbilling not only involves speech considerations but, in addition, "may infringe on other constitutional guarantees, the freedom of press and the freedom of association." 743 F.2d at 1428 (citations omitted).

has held repeatedly that activities covered by § 8(b)(4)(ii) and not sheltered by the proviso are not sheltered by the first amendment either." 798 F.2d at 1021, citing *International Longshoremen's Ass'n v. Allied International, Inc.*, 456 U.S. 212, 226-27 (1982), and *Safeco*, 447 U.S. at 616 (Powell, J., joined by Burger, Stewart and Rehnquist, JJ.), 618-19 (Stevens, J.). That same reasoning is reflected in this Court's prior decisions,⁶ other judicial opinions,⁷ and the views of learned commentators.⁸ The instant case provides a desirable vehicle to clarify this constitutional confusion.

D. Allowing the decision below to stand would occasion a substantial dislocation in the administration of the Act. As one former Board member has observed, secondary consumer boycotts, such as that involved here, have now "replaced" or "substantially supplemented" the primary strike, "at least with regard to the most bitter labor management disputes," as a "union's ultimate weapon."⁹ Today many employers can and do operate notwithstand-

⁶See, e.g., *International Brotherhood of Electrical Workers, Local 501 v. NLRB*, 341 U.S. 694, 705 (1951) ("[t]he prohibition of inducement or encouragement of secondary pressure . . . carries no unconstitutional abridgement of free speech"); *NAACP v. Claiborne Hardware*, 458 U.S. at 912 (secondary boycotts "by labor unions may be prohibited as part of 'Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.").

⁷See, e.g., *NLRB v. Local Union No. 3, International Brotherhood of Electrical Workers*, 477 F.2d 260, 266 (2d Cir.), cert. denied, 414 U.S. 1065 (1973) (the use of one form of coercion rather than another is "a distinction without a difference[.] . . . [T]he Court which rejected First Amendment objections to § 8(b)(4) had 'speech' as well as 'picketing' inducements in mind.").

⁸See, e.g., *Cox, Strikers, Picketing and the Constitution*, 4 Vand. L. Rev. 574, 599-600 (1951).

⁹Zimmerman, *The Changing Arsenal of Economic Weapons: Consequences for Section 8(b)(4), The Board and The Courts*,

(Footnote continued on the following page)

ing a strike; however, "no company can continue to operate for very long without customers [The present dispute] is not a sport case, but a harbinger of the type of activity to which unions will more and more turn in efforts to carry their case to the public and solicit consumer support for their demands."¹⁰ Handbilling and other non-picketing labor publicity has become a formidable weapon that unions can now invoke to economically strangle innocent third parties. This alarming situation is one that affects many industries, ranging from construction¹¹ to retail¹² to numerous other segments of the economy.¹³

The AFL-CIO's own President has stated that the

⁹ (Continued)

(remarks before the 1981 New York University National Conference on Labor), reprinted at 117 Daily Lab. Rep. D-1 (June 18, 1981).

¹⁰ *Id.* at D-1, D-4.

¹¹ Brief *amicus curiae* on behalf of the Associated General Contractors of America, Inc., a national construction trade association representing 30,000 firms employing approximately 3.5 million workers, in *DeBartolo I*, at 2-3 ("The issue of coercive handbilling of neutral employers is of critical importance to general contractors who work with or without collective bargaining agreements.").

¹² Brief *amicus curiae* on behalf of the American Retail Federation, a retail federation representing 1,500,000 retailers, in *DeBartolo I*, at 1-2 ("The impact of the decision [in this case] will be felt by countless retailers . . .") See also brief *amicus curiae* on behalf of the International Council of Shopping Centers, Inc. ("ICSC"), a national shopping center trade association representing a majority of the shopping centers in the United States, in *DeBartolo I*, at 2 ("Because this [case] affects the legal rights of every shopping center in the United States, the ICSC requests that the Court recognize the importance of this case to the business operations of the shopping center industry.").

¹³ Brief *amicus curiae* on behalf of The Chamber of Commerce of the United States of America, the largest association of business and professional organizations in the United States, in

(Footnote continued on the following page)

barriers heretofore placed on the use of the secondary boycott have had "the greatest impact" and created "the biggest single impediment to organization than anything else."¹⁴ That "impediment," at least with respect to the potent utilization of handbilling and other non-picketing publicity, has been removed in the Eleventh Circuit. In all of the other Circuits, particularly the Seventh, under established Board law, a union remains prohibited from engaging in such activities where they do not fall within the publicity proviso. When this case was previously before this Court, the Solicitor General, on behalf of the Board, argued that the issue presented is a "recurrent one. It is, therefore, important that the existing uncertainty as to the scope of the right of employees and their union representatives to conduct publicly campaigns to customers of neutral employers be eliminated, and that the conflict between the courts of appeal be resolved, as quickly as possible."¹⁵ The very same considerations necessitate granting the present petition.

13 (Continued)

support of the petition for writ of certiorari in *DeBartolo I*, at 2-3 (The present case "will necessarily exert a significant impact on the rights of many Chamber members and their manner of doing business . . . [T]he decision below will effect a variety of . . . business relationships These far-reaching consequences will be exacerbated by the likely acceleration of union handbilling activities such as that at issue in this case.").

¹⁴ Sevrin, *Interview With Lane Kirkland*, N.Y. Times, Nov. 16, 1981, at 12, col. 4.

¹⁵ Memorandum of the National Labor Relations Board on the petition for writ of certiorari in *DeBartolo I*, at 6.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

LAWRENCE M. COHEN

MARTIN K. DENIS

FOX AND GROVE, CHARTERED

233 South Wacker Drive

Sears Tower - Suite 7818

Chicago, Illinois 60606

(312) 876-0500

Attorneys for Petitioner

APPENDICES

INDEX TO THE APPENDICES

	<i>Page</i>
Opinion Below of the Eleventh Circuit Court of Appeals	1a
Opinion Below of the National Labor Relations Board	38a
Judgment of the Eleventh Circuit Court of Appeals	47a
Petition for Rehearing	49a
Order Extending Time to File Petition for Writ of Certiorari	51a
Constitutional Provision and Statute	52a
List of Parent Companies, Subsidiaries and Affiliates	57a

APPENDIX A – OPINIONS AND ORDERS

**FLORIDA GULF COAST BUILDING AND
CONSTRUCTION TRADES COUNCIL,**

Petitioner, Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent, Cross-Petitioner.

Edward J. DeBartolo

Corporation, Intervenor,

Chamber of Commerce, Amicus Curiae.

No. 85-3172.

United States Court of Appeals,
Eleventh Circuit.

Decided Aug. 11, 1986.

Before HILL and ANDERSON*; Circuit Judges, and
TUTTLE, Senior Circuit Judge.

CORRECTED OPINION

PER CURIAM:

In this case we must determine whether a union violates § 8(b)(4)(ii)(B) of the National Labor Relations Act when it distributes handbills urging a consumer boycott of all the tenants of a mall in furtherance of its dispute with a company constructing a building for one tenant of the mall.

I.

The facts of the case are undisputed and are detailed in the opinion of the Supreme Court in *DeBartolo Corp. v. NLRB*, 463 U.S. 147, 103 S.Ct. 2926, 77 L.Ed.2d 535 (1983) ("*DeBartolo I*"). Briefly summarized, the facts

* Judge Anderson was a member of the panel, but took no part in the consideration or decision of this case. This case is being decided by a quorum. 28 U.S.C. 46(d).

reflect the following. DeBartolo owns a large shopping mall in Tampa, Florida. Approximately 85 retail establishments are tenants of the mall. One of the mall's tenants, H.J. Wilson Company, Inc. ("Wilson's") contracted with High Construction Company ("High") to build a store for Wilson's at the mall. Florida Gulf Coast Building Trades Council, AFL-CIO (the "Union"), became involved in a primary labor dispute with High over the payment of allegedly substandard wages and benefits. The Union distributed handbills at the entrances to the mall urging that consumers not patronize tenants of the mall.

DeBartolo filed an unfair labor practice charge alleging that the Union was engaging in a secondary boycott in violation of the National Labor Relations Act, as amended ("NLRA" or the "Act"), 29 U.S.C. § 151 *et seq.* In February 1980, the general counsel of the National Labor Relations Board ("NLRB" or the "Board") issued a complaint against the Union alleging a violation of § 8(b)(4)(ii)(B) of the Act.¹ Without deciding whether the distribution of the handbills

¹ The statute reads in relevant part:

(b) It shall be an unfair labor practice for a labor organization or its agents— . . . (4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is— . . . (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as a representative of his employees unless such labor organization has been certified as the representative of such employees under the provision of § 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

29 U.S.C. § 158(b)(4)(ii)(B).

violated the statute, the Board concluded that the handbilling was not prohibited by the Act because of the "publicity proviso"² and dismissed the complaint. *Florida Gulf Coast Buildings Trade Council, AFL-CIO (Edward J. DeBartolo Corp.)*, 252 N.L.R.B. 702 (1980). The U.S. Court of Appeals for the Fourth Circuit affirmed. *DeBartolo v. NLRB*, 662 F.2d 264 (4th Cir.1981). In *DeBartolo I*, the Supreme court reversed the decision of the Fourth Circuit and held that the Union's conduct fell outside the protection of the publicity proviso contained in § 8(b)(4). 463 U.S. at 157, 103 S.Ct. at 2932. The Court did not determine whether the distribution of the handbills violated the underlying restrictions of the NLRA or, if so prohibited, whether the NLRA is constitutional under the First Amendment.

On remand, the NLRB issued the supplemental decision and order which are the subject of the instant case. The Board found that:

By distributing handbills urging potential customers not to shop at East Lake Square Mall, the [Union] has coerced the mall tenants with an object of forcing the mall tenants to cease doing busi-

² The proviso reads as follows:

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

29 U.S.C. § 158(b)(4).

ness with DeBartolo in order to force DeBartolo and/or Wilson's to cease doing business with High, thereby violating Section 8(b)(4)(ii)(B) of the Act.

Record on Appeal at 237. The Board did not consider whether its interpretation of the Act would violate the First Amendment, presuming, "as a Congressionally created administrative agency[,] . . . the constitutionality of the Act we administer." *Id.* at 236. The Board issued an order instructing the Union to cease and desist from the distribution of handbills and requiring the Union to post an appropriate notice. The Union petitions this court to set aside the decision and order of the NLRB. The NLRB presents a cross-petition for enforcement of its order. Because we find that the Union's handbilling activities do not violate § 8(b)(4)(ii)(B) of the NLRA, we grant the Union's petition and deny enforcement of the order.

II.

The Supreme Court recognized that "this case arises out of an entirely peaceful and orderly distribution of a written message, rather than picketing."³ *DeBartolo I*, 463 U.S. at 157, 103 S.Ct. at 2933. The Union contends that such distribution of a written message is a form of speech protected by the First Amendment. If § 8(b)(4)(ii)(B) is interpreted to restrict the distribution of handbills, then, the Union argues, the NLRA violates the First Amendment. Neither the courts nor the NLRB has directly considered the constitutionality of restricting nonpicketing union publicity. *Cf. Hospital & Service*

³This appears to be the correct interpretation of the language of the Court:

Stressing the fact that the case arises out of an entirely peaceful and orderly distribution of a written message, rather than picketing, the Union argues that its handbilling is a form of speech protected by the First Amendment.

463 U.S. at 157, 103 S.Ct. at 2933 (emphasis added).

Employees Union v. NLRB (Delta Air Lines), 743 F.2d 1417, 1428 (9th Cir.1984). If we were to conclude that the statutory provision in question makes it unlawful for unions to distribute such handbills to the public, we would be required to consider whether this provision is consistent with the First Amendment. However, the statutory question presented is almost as novel as the constitutional question. Neither the Supreme Court nor the court of appeals for any circuit has decided whether the statutory prohibition against threatening, coercing or restraining applies to the distribution of handbills.

The Supreme Court has held "that an Act of Congress not be construed to violate the Constitution if any other possible construction remains available." *NLRB v. Catholic Bishop Of Chicago*, 440 U.S. 490, 500, 99 S.Ct. 1313, 1318, 59 L.Ed.2d 533 (1979); accord *DeBartolo I*, 463 U.S. at 157 n. 10, 103 S.Ct. at 2933 n. 10 ("when Congress legislates in a fashion that restricts communicative activity, it expects the statutory language to be construed narrowly"); *International Association of Machinists v. Street*, 367 U.S. 740, 790, 81 S.Ct. 1784, 1790, 6 L.Ed.2d 1141 (1961) ("Federal statutes are to be construed as to avoid serious doubt of their constitutionality."). "Moreover, the Court has followed this policy in the interpretation of the [NLRA] and related statutes." *Catholic Bishop*, 440 U.S. at 500, 99 S.Ct. at 1318. In *Catholic Bishop*, the Court stated that it would determine whether the statutory interpretation proposed by the NLRB "would give rise to serious constitutional questions." *Id.* at 501, 99 S.Ct. at 1319. If so, the Court held that "the affirmative intention of the Congress clearly expressed," *id.* at 501, 99 S.Ct. at 1319 (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147, 77 S.Ct. 699, 704, 1 L.Ed.2d 709 (1957)), must be identified, before the statute could be construed in such a manner.

Thus, we must consider whether the statutory interpretation suggested by the Board would cause serious

doubts about the constitutionality of § 8(b)(4). If we determine that there would be serious constitutional questions, we must examine the statute and its legislative history to identify "the affirmative intention of the Congress clearly expressed" to restrict such handbilling.

III.

In *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971), the Supreme Court considered the validity of an injunction against distribution of leaflets which were alleged to be intended to coerce and intimidate an individual. The individual was a real estate broker who was alleged to have engaged in tactics termed "panic peddling" and "block busting." A community organization asked the broker to sign an agreement that he would not solicit real estate business in their community. When the broker refused to sign the agreement, the organization distributed leaflets near his home which were critical of his business and which were designed to cause him to sign the agreement with them. An injunction prohibiting the organization from distributing the leaflets was affirmed by a state appellate court on the ground that the alleged activities were coercive and intimidating, rather than informative, and were therefore not entitled to First Amendment protection. *Id.* at 418, 91 S.Ct. at 1577. The Supreme Court reversed, explaining:

This Court has often recognized that the activity of peaceful pamphleteering is a form of communication protected by the First Amendment The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper [S]o long as the means are peaceful, the communication need not meet standards of acceptability.

Id. at 419, 91 S.Ct. at 1577-78. Thus, the distribution of handbills is generally fully protected by the First Amendment, even when designed to pressure others to act.

In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982), the Court, quoting at length from *Organization for a Better Austin*, held that the First Amendment protects a secondary boycott organized by a civil rights group. The Court stated: "Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action." 458 U.S. at 910, 102 S.Ct. at 3424. " 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts.' " *Id.* (quoting *Thomas v. Collins*, 323 U.S. 516, 537, 65 S.Ct. 315, 325, 89 L.Ed. 430 (1945)).

However, in *Claiborne Hardware*, the Court "recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association." *Id.* at 912, 102 S.Ct. at 3425. The Court gave the following as an example:

Unfair trade practices may be restricted. Secondary boycotts and picketing by labor unions may be prohibited, as part of "Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife."

Id. (quoting *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. 607, 617-18, 100 S.Ct. 2372, 2378, 65 L.Ed.2d 377 (Blackmun, J., concurring in part)).

The discussion of restrictions on secondary picketing in *Claiborne Hardware* reflects the settled principle that labor picketing is entitled to less First Amendment protection than pure speech. Such treatment is based on the concept that picketing includes elements in addition to speech.

These additional elements justify restrictions on picketing which would not be permitted vis-a-vis pure speech:

[W]hile picketing is a mode of communication it is inseparably something more and different. Industrial picketing "is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." [*Bakery & Pastry Drivers & Helpers Local v. Wohl*, 315 U.S. 769 775, 776 [62 S.Ct. 816, 819, 86 L.Ed. 1178] (Douglas, J., concurring)] Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word

. . . .

A State may constitutionally permit picketing despite the ingredients in it that differentiate it from speech in its ordinary context And we have found that because of its element of communication picketing under some circumstances finds sanction in the Fourteenth Amendment However general or loose the language of opinions, the specific situations have controlled decision. It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent.

Hughes v. Superior Court, 339 U.S. 460, 464-65, 70 S.Ct. 718, 720-21, 94 L.Ed. 985 (1950). See also *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 311 n. 17,

99 S.Ct. 2301, 2315 n. 17, 60 L.Ed.2d 895 (1979);⁴ *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*, 377 U.S. 58, 77, 84 S.Ct. 1063, 1073, 12 L.Ed.2d 129 (1964) (Black, J., concurring);⁵ *International*

⁴The Supreme Court noted that although secondary picketing against a neutral employer could be constitutionally prohibited, picketing was different from other manners of expression for constitutional purposes:

Although we have previously concluded that picketing aimed at discouraging trade across the board with a truly neutral employer may be barred compatibly with the Constitution, . . . we have noted that, for First Amendment purposes, picketing is qualitatively "different from other modes of communication."

Babbitt, 442 U.S. at 311 n.17, 99 S.Ct. at 2315 n. 17 (citations omitted).

⁵Justice Black stated:

"Picketing," in common parlance and § 8(b)(4)(ii)(B), includes at least two concepts: (1) patrolling, that is standing or marching back and forth or round and round on the street, sidewalks, private property, or elsewhere, generally adjacent to someone else's premises; (2) speech, that is arguments, usually on a placard, made to persuade other people to take the picketers' side of a controversy While "the dissemination of information concerning the facts of the labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution," *Thornhill v. Alabama*, 310 U.S. 88, 102, 60 S.Ct. 736, 744, 84 L.Ed. 1093, patrolling is, of course, conduct, not speech, and therefore is not directly protected by the First Amendment. It is because picketing includes patrolling that neither *Thornhill* nor cases that followed it lend "support to the contention that peaceful picketing is beyond legislative control." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 499-500, 69 S.Ct. 684, 690, 689, 93 L.Ed. 834. . . . However, when conduct not constitutionally protected, like patrolling, is intertwined as in picketing, with constitutionally protected free speech and press, regulation of the non-protected conduct may at the same time encroach on freedom of speech and press. *Tree Fruits*, 377 U.S. at 77, 84 S.Ct. at 1073-74 (Black, J., concurring).

Board of Teamsters, Local 695 v. Vogt, 354 U.S. 284, 77 S.Ct. 1166, 1 L.Ed.2d 1347 (1957). In *Safeco*, Justice Stevens reemphasized that picketing has a non-speech element the regulation of which may justify incidental restrictions of its speech element:

I have little difficulty in concluding that the restriction at issue in this case is constitutional. Like so many other kinds of expression, picketing is a mixture of conduct and communication. In the labor context, it is the conduct element rather than the particular idea being expressed that often provides the most persuasive deterrent to third persons about to enter a business establishment. In his concurring opinion in *Bakery Drivers v. Wohl*, 315 U.S. 769, 776-77, 62 S.Ct. 816, 819-20, 86 L.Ed. 1178, Mr. Justice Douglas stated:

"Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation."

Indeed, no doubt the principal reason why handbills containing the same message are so much less effective than labor picketing is that the former depend entirely on the persuasive force of the idea.

The statutory ban in this case affects only that aspect of the union's efforts to communicate its views that calls for an automatic response to a signal rather than a reasoned response to an idea.

Safeco, 447 U.S. at 618-19, 100 S.Ct. at 2379-80 (Stevens, J., concurring in part).

The handbilling in the instant case was peaceful and orderly. It involved none of the non-speech elements, *e.g.*,

patrolling, which justify restrictions on picketing.⁶ In attempting to enlist the aid of consumers in its dispute with

⁶The NLRB suggests that handbilling like picketing involves conduct in addition to speech, *i.e.*, the "physical pressure" of the person distributing the handbills or pamphlets. In making this argument, the NLRB quoted the case of *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603 (1968), *overruled on other grounds*, *Hudgens v. NLRB*, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976). However, the NLRB misquoted *Logan Valley Plaza* in its brief. In *Logan Valley*, the Supreme Court stated that handbilling involves conduct other than speech "namely, the physical presence of the person distributing the leaflets." *Id.* at 316, 88 S.Ct. at 1607 (emphasis added). On the facts of *Logan Valley*, the Supreme Court was necessarily concerned with "presence"; nowhere did it address "pressure" applied by those distributing handbills.

The physical presence of people distributing handbills was relevant in *Logan Valley*, a case involving picketing in a shopping center, because in earlier cases the Court had found "that title to municipal property [was], standing alone, an insufficient basis for prohibiting all [physical presence on] such property for the purpose of distributing printed matter." *Logan Valley*, 391 U.S. at 316, 88 S.Ct. at 1607. From this rationale, which had been developed in handbilling cases, the Court reasoned that title to property was also insufficient reason to ban people carrying informational picket signs. *Id.* Fully protected speech usually involves the physical presence of the speaker and reasonable content-neutral time, place, or manner restrictions may be placed on fully protected speech because of, among other reasons, the physical presence of the speaker or those listening to him. *See, e.g., Schneider v. State of New Jersey*, 308 U.S. 147, 160-61, 60 S.Ct. 146, 150, 84 L.Ed. 155 (1939) ("[A] person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic.").

In this case, there is no indication in the record that the people distributing the handbills outside the mall were pressuring or harassing the consumers entering the mall. Thus, we are not faced with the situation where the distribution of handbills took on some of the aspects of picketing.

the construction company, the Union was relying "entirely on the persuasive force of the idea." *Id.* at 619, 100 S.Ct. at 2380. The handbills left the recipients completely free to act in agreement with the ideas presented or to refuse to do so.

In the labor context, the Supreme Court has also held that communication which is merely a "threat of retaliation based on misrepresentation and coercion," *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618, 89 S.Ct. 1918, 1942, 23 L.Ed.2d 547 (1969), is "without the protection of the First Amendment." *Id.* See also *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469, 477, 62 S.Ct. 344, 348, 86 L.Ed. 348 (1941). In those cases, the Supreme Court held that communications which contained a "threat of reprisal or force or promise of benefit" are not entitled to First Amendment protection.

In the instant case, the NLRB held that the Union, by urging consumers to avoid patronizing the mall tenants, hoped to coerce the mall tenants to pressure Wilson's and/or DeBartolo to force High, with whom the Union has a primary dispute, to use Union standards. However, a finding of statutory coercion would not control the First Amendment analysis. While the focus of § 8(b)(4)(ii)(B) is coercion of the secondary employer, the secondary employer vis-a-vis the handbill is a non-listener. The handbills in this case lacked any elements which could threaten, coerce or restrain the listeners, i.e., the consumers. As pointed out in *Gissel Packing* and *Virginia Electric & Power*, for purposes of assessing the First Amendment protection to which communication is entitled, a court must focus on the possible coercion of the listeners, in this case, the consumers. Moreover, as the Supreme Court stated in *Organization for a Better Austin v. Keefe* and *NAACP v. Claiborne Hardware Co.*, the claim that speech is intended to exercise an ultimate coercive impact upon someone does not remove that speech from the reach of the First Amendment. *Claiborne Hardware*, 458 U.S. at

911, 102 S.Ct. at 3424; *Organization for a Better Austin*, 402 U.S. at 419, 91 S.Ct. at 1577.

In addition, it should be pointed out that the Union was not seeking to have the consumers, the mall tenants, or DeBartolo and/or Wilson's do anything which would be illegal. The consumers were legally free to agree with the Union's position and decline to patronize the mall tenants. The mall tenants would have been acting equally legally if, in response to the consumer pressure, they requested that DeBartolo and/or Wilson's request that High use union labor. In the same way, Wilson's and/or DeBartolo would have been within the law if they requested High to accede to the Union's demands regarding terms and conditions of employment.

In light of the absence of the non-speech elements which have permitted restrictions on labor picketing and in light of the full First Amendment protection afforded to handbilling and pamphleteering, we conclude that if § 8(b)(4)(ii)(B) is construed to prohibit certain types of handbilling, serious constitutional questions will arise.⁷ Therefore, we must examine the statute and its legislative

⁷ If the statute is read to prohibit handbilling, that prohibition would clearly be content-based. The prohibition is addressed specifically to handbilling that is threatening, coercive, or restraining. When the government regulates an expression of a particular message, without regard to whether the expression consists of speech or speech plus conduct, it has legislated on the basis of content. In order to regulate speech on the basis of content, it is normally necessary for the government to prove a compelling state interest and for the government to show that the statute was narrowly drawn to achieve that end. See, e.g., *United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983); *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37, 55, 103 S.Ct. 948, 960, 74 L.Ed.2d 794 (1983); *Carey v. Brown*, 447 U.S. 455, 461-62, 100 S.Ct. 2286, 2290, 65 L.Ed.2d 236 (1980);

(Footnote continued on the following page)

history in order to identify "the affirmative intention of the Congress clearly expressed" to prohibit such speech.

7 Continued

First National Bank v. Bellotti, 435 U.S. 765, 786, 96 S.Ct. 1407, 1421, 55 L.Ed.2d 707 (1978). It has been suggested that § 8(b)(4)(ii)(B) "cannot meet the exacting scrutiny of the compelling interest standard." Goldman, *The First Amendment and Nonpicketing Labor Publicity Under Section 8(b)(4)(ii)(B) of the National Labor Relations Act*, 36 Vand.L.Rev. 1469, 1505 (1983); accord Comment, "It Takes More Than Money to Fly Delta. It Takes Nerve": *Union's Secondary Boycott Publicity and the First Amendment: Delta Air Lines*, 67 Minn.L.Rev. 1235, 1271 (1983).

The NLRB suggests that speech which urges consumers to engage in a secondary boycott is commercial speech which can be and has been restricted in response to a substantial governmental interest.

Whether the Union's handbills constitute commercial speech or should be treated as commercial speech is a difficult question which would by no means be as easily resolved as the NLRB suggests. It is not clear that the handbills involved in the instant case are commercial speech or should be treated as commercial speech. It would seem that a strong argument could be made that the Union in the instant case was expressing social and moral values, as well as economic considerations in its written message. Moreover, the definition of commercial speech is not clear. In *Central Hudson Gas & Electric*, the Supreme Court described commercial speech as "expression related solely to the economic interest of the speaker and his audience" and also as "speech proposing a commercial transaction." *Id.* at 561-62, 100 S.Ct. at 2349. Justice Stevens, concurring in *Central Hudson Gas & Electric*, suggested that the former definition of commercial speech was too broad. He thought that such a definition might encompass speech such as that made by an economist or by a labor leader. Thus, the Court's definition of commercial speech might be broad enough to encompass labor speech, although the Court has yet to include economic or labor speech in that category. *Id.* at 579-80, 100 S.Ct. at 2358 (Stevens, J., concurring). Previously, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), in which the Supreme

(Footnote continued on following page)

IV.

The language of the statute contains no clear expression of an affirmative intent of Congress to prohibit the distribution of handbills urging a secondary boycott. It is true, however, that the prohibition against threatening, coercing, or restraining could be read very broadly. Therefore, we must examine the legislative history of this portion of the NLRA to determine whether Congress intended to proscribe such publicity.⁸

7 (Continued)

Court for the first time extended First Amendment protection to commercial speech, the Court compared labor speech and commercial speech and found "no satisfactory distinction between the two kinds of speech." *Id.* at 763, 96 S.Ct. at 1826. However, in making this point, the Court cited *Gissel Packing Co.* and *Virginia Electric & Power Co.*, cases where an employer's communications contained threats and coercion of the listeners, not information. Thus, labor speech which does not amount to threats or coercion may not be considered the equivalent of commercial speech and may be entitled to full First Amendment protection.

Given our disposition of the statutory issue, we need not address whether the Union's handbills constitute commercial speech or whether the handbills should be treated like commercial speech, or, if the handbills should be treated like commercial speech, whether there is a substantial government interest which the statute directly advances in a manner "not more extensive than is necessary to serve that interest." *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980). It has been suggested that nonpicketing labor publicity is not commercial speech and should not be treated like commercial speech because it satisfies the values underlying the First Amendment. Goldman, *supra*, at 1490.

⁸The Union does not challenge the findings that the mall tenants were secondary parties and that the object of the handbilling was a boycott of the mall tenants. Their statutory argument is that when Congress enacted a prohibition on threatening, coercing, or restraining, it did not intend to prohibit handbilling.

Congress originally made secondary boycotts an unfair labor practice in 1947 under the Taft-Hartley Act. Section 8(b)(4), as in effect from 1947 to 1959, prohibited unions from inducing a strike where the object of the strike was compelling an employer to cease doing business with any other person.⁹ There were three major loopholes in the Taft-Hartley language:

Since only inducement of "employees" was proscribed, direct inducement of a supervisor or the secondary employer by threats of labor trouble was not prohibited. Since only a "strike or a concerted refusal" was prohibited, pressure upon a single employee was not forbidden. Finally, railroads, and municipalities were not "employers" under the Act and therefore an inducement or encouragement of their employees was not unlawful.

Tree Fruits, 377 U.S. at 64-65, 84 S.Ct. at 1067-68.

During both the Eighty-fifth Congress and the Eighty-sixth Congress, the Senate passed labor reform bills—the Kennedy-Ives bill during the Eighty-fifth Congress and the Kennedy-Ervin bill during the Eighty-sixth Congress—neither of which included any amendments to § 8(b)(4). *Id.* at 65, 84 S.Ct. at 1067. Several amendments proposed to fill the three major gaps in the Taft-Hartley Act were rejected by the Senate.

During the Eighty-sixth Congress, the Eisenhower Administration did introduce a bill to close the three

⁹The history of the 1959 Amendments to the NLRA has been discussed at length in several cases. See, e.g., *Tree Fruits*, 377 U.S. at 62-71, 84 S.Ct. at 1065-71; *NLRB v. Servette, Inc.*, 377 U.S. 46, 51-55, 84 S.Ct. 1098, 1102-04, 12 L.Ed.2d 121 (1964). While our discussion of the legislative history repeats much of what has been set out in earlier cases, we must reexamine the whole legislative history focusing for the first time on whether Congress intended to proscribe nonpicketing labor publicity.

loopholes. In a message to Congress, "Transmitting a 20-point Program to Eliminate Abuses and Improper Practices in Labor-Management Relations," President Eisenhower proposed to

amend the secondary boycott provisions of the [NLRA] so as to cover the direct coercion of employers to cease or agree to cease doing business with other persons; union pressures directed against secondary employers not otherwise subject to the act; and inducements of individual employees to refuse to perform services with the object of forcing their employers to stop doing business with others; and to make clear that secondary activities permitted against an employer performing "farmed-out struck work" and, under certain circumstances, against secondary employers engaged in work at a common construction site with the primary employer.

S.Doc. No. 10, 86th Cong., 1st Sess. 3 (1959), reprinted in 1 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 82 (1959) [hereinafter cited as "Leg.Hist."]. The Administration bill, S. 748, was the first Senate bill to propose making it an unfair labor practice to "threaten, coerce or restrain" a secondary employer. In *Tree Fruits*, the Supreme Court noted that in testifying in support of the Administration's bill, the Secretary of Labor did not refer to consumer picketing as making the amendments necessary. *Tree Fruits*, 377 U.S. at 65, 84 S.Ct. at 1067. It is additionally clear that the Secretary did not refer to publicity directed at consumers as making amendments to § 8(b)(4) necessary. 105 Cong.Rec. 1567-68 (1959), reprinted in 2 Leg.Hist. at 993-94. Moreover, the Supreme Court found that Senator Goldwater, "an insistent proponent of stiff boycott curbs," who proposed his own amendments to close the loopholes, did not refer to consumer picketing, must less publicity directed at consumers, as making necessary the amendments which he and the Administration proposed. *Tree Fruits*, 377 U.S.

at 65, 84 S.Ct. at 1067; see 105 Cong.Rec. 1163 and 5764 (1959), reprinted in 2 Leg.Hist. at 979 and 1079.¹⁰

When the Senate Committee on Labor and Public Welfare reported out the Kennedy-Ervin Bill, S. 1555, without any proposal to amend § 8(b)(4), the proponents of such a change again listed the major loopholes which they felt needed to be closed in the prohibition against secondary boycotts. S.Rep. No. 187 on S. 1555, 86th Cong., 1st Sess. 70 (1959), reprinted in 1 Leg.Hist. at 475, U.S. Code Cong. & Admin. News 1959, p. 2318. Their report mentioned the problem with railroad and government employees, the inducement of individual employees, and hot-cargo clauses.¹¹ It also focused on "coercion of employers." The report pointed out that there was a problem with a union threatening a secondary employer "with a strike or picket line if he continues to do business with [the primary] employer." *Id.* It stated that the Administration bill, S. 748, solved the "coercion of employers" problem by amending § 8(b)(4) to make the restriction apply to "'threaten [sic], coerce, or restrain any person engaged in commerce . . . ' as well as 'induce or encourage any individual employed by any person.' " *Id.*¹² The Administration bill also dealt with the other three loopholes discussed. Thus, it is evident that the proponents

¹⁰ The Supreme Court noted that Senator Goldwater did refer to consumer picketing when the bill agreed upon by the House-Senate conference committee was before the Senate. *Tree Fruits*, 377 U.S. at 65 n. 10, 84 S.Ct. at 1067 n. 10. His statements in support of the conference bill are discussed *infra*.

¹¹ "Hot-cargo" clauses are clauses in union contracts whereby the employer agrees not to handle products which the union has "blacklisted."

¹² The report pointed out that Senator McClellan had introduced two bills, S. 1384 and S. 1385, which also dealt with these loopholes. S.Rep. No. 187 on S. 1555, 86th Cong., 1st Sess. 70, reprinted in Leg.Hist. 475.

of the amendments to § 8(b)(4) had in mind non-consumer picketing and more direct economic actions, e.g., strikes, when they proposed to amend that section by making its restriction apply to "threaten, coerce, or restrain." There is no indication that they intended to restrict distribution of publicity to consumers.

When the Kennedy-Ervin Bill was being debated by the full Senate, Senator McClellan, who had offered his own bills which included amendments to § 8(b)(4), proposed an amendment to make it unlawful to "exert, or attempt to exert any economic or other coercion against, or offer any inducement to, any [secondary] person engaged in commerce" 105 Cong.Rec. 5970 (1959), reprinted in 2 Leg.Hist. at 1193. Senator McClellan stated that the amendment would close the three loopholes discussed above and would also apply to secondary consumer picketing:

The amendment, Mr. President, covers pressure in the form of dissuading customers from dealing with secondary employers. That refers to establishing a picket line around a merchant's store, when the merchant handles the product of a company or of a manufacturing plant in which there is a strike. In other words, that is a form of coercion against an innocent employer, in an effort to compel the employer who has a strike on his hands to come to terms with the union. It is an effort to influence the original employer.

....

I point out that we have cases of merchants who for 20 years, 10 years, or for a long period of time, may have been handling a particular brand or product. A merchant may have built his business around the product The merchant may have a competitor who is handling a competitive product made by another manufacturer, which serves the same function, but

which is a different brand and is manufactured by someone else.

In one of these plants there may be a strike, and the union may picket the merchant who is handling the product of the struck plant. The union may say to the merchant, "You cannot sell this product. If you do, we will picket your place of business. Thus you will not be able to get your supplies, because the Teamsters will not cross the picketline."

In addition, the merchant's customers would be embarrassed. They would be harassed. They would see the picket sign. What would the picket sign say? It would say "Unfair to labor." How is the merchant unfair to labor? It is simply a case of the merchant not being willing to stop handling a product which he has been handling for 20 years and on which he has built his business. That is a secondary boycott which, it seems to me, ought to be prohibited.

105 Cong.Rec. 5971 (1959), *reprinted in* 2 Leg.Hist. at 1194 (emphasis added).¹³ It is clear from this statement that Senator McClellan intended only to prohibit picketing of the secondary merchant. Prior to his proposals regarding consumer picketing, the proponents of the Administration bill had not discussed any form of restriction on appeals to consumers. *See Tree Fruits*, 377 U.S. at 65-67, 84 S.Ct. at 1067-68.

As was pointed out in *Tree Fruits*, the proposed House legislation "[f]rom the outset . . . included provisions concerning secondary boycotts." *Id.* at 67, 84 S.Ct. at 1068. "The Landrum-Griffin bill, which was ultimately passed by the House, embodied the Eisenhower Administration's proposals as to secondary boycotts. The initial statement of Congressman Griffin in introducing the bill which bears

¹³ Senator McClellan's amendment was rejected. 105 Cong.Rec. 5975 (1959), *reprinted in* 2 Leg.Hist. at 1198.

his name, contains no reference to consumer picketing in the list of abuses which he thought required the secondary boycotts amendments." *Id.* at 67, 84 S.Ct. at 1068-69 (footnotes omitted). Thus, while the proponents of the House bill wanted, from the beginning of debate, to amend § 8(b)(4) to close the major loopholes, there is no indication that *consumer* picketing or publicity was initially considered a problem.

On August 6, 1959, President Eisenhower delivered an address from his White House office on the need for effective labor reform. In this speech, the President called for restrictions on secondary consumer picketing. In discussing such picketing, President Eisenhower gave the following example:

Take another company—let us say, a furniture manufacturer. The employees vote against joining a particular union. Instead of picketing the furniture plant itself, unscrupulous organizing officials, in this case, use another scheme. They picket the stores which sell the furniture this plant manufactures. The purpose is to prevent those stores from handling that furniture.

How can anyone justify this kind of pressure against stores which are not involved in any dispute. They are innocent bystanders. This kind of action is designed to make the furniture stores bring pressure on a furniture plant and its employees—to force those employees into a union they do not want. This is an example of a secondary boycott.

I want that sort of thing stopped. So does America.

105 Cong.Rec. A8488 (1959), *reprinted in* 2 Leg.Hist. at 1842. Thus, President Eisenhower, in calling the attention of Congress and the nation to secondary action directed at consumers, framed the problem solely in terms of consumer picketing.

As the Supreme Court in *Tree Fruits* pointed out, later during House debates, Rep. Griffin "did discuss consumer picketing, but only in the context of its abuse when directed against shutting off the patronage of a secondary employer." *Tree Fruits*, 377 U.S. at 67, 84 S.Ct. at 1069 (emphasis added). In the following colloquy, which took place six days after the President's address, Rep. Griffin discussed secondary action aimed at consumers:

MR. BROWN Of Ohio . . .

. . . .

My question concerns the picketing of consumer entrances to retail stores selling goods manufactured under strike. Would that situation be prohibited under the gentleman's bill?

MR. GRIFFIN. Let us take for example the case that the President talked about in his recent radio address. A few newspapers reported that the secondary boycott described by the President would be prohibited under the present act. It will be recalled that the case involved a dispute with a company that manufactured furniture. Let us understand that we are not considering, as I understand your question, the right to picket at the manufacturing plant where the dispute exists.

MR. BROWN Of Ohio. That is right. We are looking only at the problem of picketing at a retail store where the furniture is sold.

MR. GRIFFIN. Then, we are not talking about picketing at the place of the primary dispute. We are concerned about picketing at the store where the furniture is sold. Under the present law, if the picketing happens to be at the employee entrance so that clearly the purpose of the picketing is to induce the employees of the secondary employer not to handle the products of the primary employer, the boycott could be enjoined.

However, if the picketing happened to be around

at the consumer entrance, and if the purpose of the picketing were to coerce the employer not to handle those goods, then under the present law, because of technical interpretations, the boycott would not be covered.

MR. BROWN Of Ohio. In other words, the Taft-Hartley Act does not cover such a situation now?

MR. GRIFFIN. The way it has been interpreted.

MR. BROWN Of Ohio, But the Griffin-Landrum bill would?

MR. GRIFFIN. Our bill would; that is right. If the purpose of the picketing is to coerce or restrain the employer of that second establishment, to get him not to do business with the manufacturer—then such a boycott could be stopped.

MR. BROWN Of Ohio. Not to sell goods of some concern that is on strike. Would that same rule apply to the picketing at the consumer entrances, for instance, of plumbing shops, or newspapers that might run the advertising of these concerns, or radio stations that might carry their program?

MR. GRIFFIN. Of course, this bill and any other bill is limited by the constitutional right of free speech. If the purpose of the picketing is to coerce the retailer not to do business with the manufacturer, whether it is plumbing—

MR. BROWN Of Ohio. Advertising.

MR. GRIFFIN. Advertising, or anything else, it would be covered by our bill. It is not covered now.

105 Cong.Rec. 14,339 (1959), reprinted in 2 Leg.Hist. at 1615. It is clear from the above colloquy that Rep. Griffin, who introduced the bill which was eventually passed by the House and whose bill contained the restricting amendments which eventually became law, clearly had in mind only prohibiting consumer picketing by his proposed

amendments to § 8(b)(4).¹⁴ Moreover, it is clear that he recognized that his bill was limited by the constitutional right of free speech.

The only suggestion in either house of Congress that the proposed amendments to § 8(b)(4) would apply to nonpicketing labor publicity came from opponents of the amendments. As the Supreme Court pointed out in *Tree Fruits*, "Senator Humphrey first sounded the warning early [in the Senate debates]." *Tree Fruits*, 377 U.S. at 66, 84 S.Ct. at 1068. In *Tree Fruits*, however, the Supreme Court stated that the interpretation which the opponents of a bill gave to that bill was not controlling. The Court explained:

¹⁴ The Supreme Court has stated, "the prohibition of § 8(b)(4) is keyed to the coercive nature of the conduct, whether it be picketing or otherwise." *Tree Fruits*, 377 U.S. at 68, 84 S.Ct. at 1069. The NLRB argues that by stating that coercive conduct might be "picketing or otherwise," the Supreme Court recognized that § 8(b)(4) might prohibit nonpicketing publicity. The prohibitions of § 8(b)(4) were intended to apply to actions other than picketing, e.g., direct threats to the secondary employer, actions aimed at the secondary employer's employees, or strikes.

The activities other than picketing to which § 8(b)(4) has been held to apply have involved conduct in addition to communicative activity. Among the variety of courses of conduct which have been held to be coercive under § 8(b)(4) are: two unions' demands for monetary settlement payments for contract violations, *Electro-Coal Transfer Corp. v. General Longshore Workers*, 591 F.2d 284 (5th Cir.1979); a union's threat to terminate an agreement under which it served as a bargaining agent on a construction project unless the primary contractor took a subcontractor off the job, *NLRB v. IBEW*, 405 F.2d 159 (9th Cir.1968), cert. denied, 395 U.S. 921, 89 S.Ct. 1772, 23 L.Ed.2d 237 (1969); union's economic sanction of refusing to refer its members for employment as it was bound to by agreement, *NLRB v. Local 825, Int'l Union of Operating Engineers*, 315 F.2d 695 (3d Cir.1963). Thus, "otherwise" could refer to many types of conduct. There is no indication that either the Court or any proponent of the amendments to § 8(b)(4) intended that they apply to nonpicketing labor publicity.

[W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach. "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt."

Tree Fruits, 377 U.S. at 66, 84 S.Ct. at 1068 (citations omitted). The Court therefore refused to give any weight to the interpretations suggested by Senator Humphrey and Senator Morse, another opponent of the amendments to § 8(b)(4). *Id.*

A House-Senate conference committee, chaired by Senator Kennedy, considered the Landrum-Griffin bill and the Kennedy-Ervin bill and reached a conference agreement. The suggestions of the committee regarding § 8(b)(4) were enacted into law. The conference committee agreed to recommend the amendments to § 8(b)(4) contained in the Landrum-Griffin bill. (The Kennedy-Ervin bill contained no amendments to § 8(b)(4).) In response to the fears of the opponents of the amendments to § 8(b)(4), the conference committee drafted the publicity proviso to § 8(b)(4), which protects union appeals made through hand-billing, advertising, and other nonpicketing publicity to consumers not to deal with a secondary employer who has a "producer-distributor" relationship with a primary employer. *DeBartolo I*, 463 U.S. at 156, 103 S.Ct. at 2932. The proviso "'was the outgrowth of a profound Senate concern that the unions' freedom to appeal to the public for support of their case be adequately safeguarded.'" *NLRB v. Servette, Inc.*, 377 U.S. 46, 55, 84 S.Ct. 1098, 1104, 12 L.Ed.2d 121 (1964)." *DeBartolo I*, 463 U.S. at 157 n. 10, 103 S.Ct. at 2933 n. 10.

The publicity proviso was clearly drafted to cover nonpicketing labor publicity in the only example of secondary

consumer activity which had been discussed-secondary union action taken against a retail store selling a struck manufacturer's product. This paradigm had been placed before the nation and Congress by President Eisenhower in his August 6 radio address. Senator McClellan and Rep. Griffin also focused on this typical case. The legislators who feared that the amendments proposed to § 8(b)(4) would cover nonpicketing labor publicity also discussed such publicity in terms of this paradigm case.¹⁵ However, the fact that the publicity proviso was drafted in terms of the paradigm case, does not change the fact that at no time had a proponent of the amendments to § 8(b)(4) stated that nonpicketing should be or was being prohibited by the amendments.

The Board argues that the publicity proviso is an exception to the prohibitions contained in § 8(b)(4). The Board contends that if Congress had not intended to restrict nonpicketing publicity under § 8(b)(4)(ii)(B), it would not have drafted the publicity proviso. In a case of a true statutory exception what the Board argues would be true-an exception exists only to exempt something which would otherwise be covered. However, the legislative history makes it clear that not only did the supporters of the amendments to § 8(b)(4) intend only to prohibit consumer picketing, but also that the publicity proviso was inserted both to clarify their position that nonpicketing publicity was not prohibited and, most importantly, to allay the fears of the opponents of the amendments that such speech would be restricted.

In the House, Rep. Griffin and, in the Senate, Senator Goldwater, introduced a report summarizing the "nature

¹⁵ See, e.g., 105 Cong.Rec. 5530 (1959), reprinted in 2 Leg.Hist. at 1037 (Senator Humphrey); 105 Cong.Rec. 15,222 (1959), reprinted in 2 Leg.Hist. at 1708 (Rep. Thompson and Senator Kennedy).

of the settlement reached by the conference on the important points of difference between the House and the Senate bill [sic]." 105 Cong. Rec. 16,539 (1959), reprinted in 2 Leg.Hist. at 1712 (quoting Congressman Griffin), and 105 Cong.Rec. 16,435 (1959), reprinted in 2 Leg.Hist. at 1453 (Senator Goldwater). The report contained the following summary analysis of Title VII of the bill, which included the amendments to § 8(b)(4):

105 Cong.Rec. 17,181 (1959), reprinted in 2 Leg.Hist. at 1454; 105 Cong.Rec. 16,539-40 (1959), reprinted in 2 Leg.Hist. at 1712-13.

Regarding secondary boycotts, the summary analysis quoted above indicates that the House bill was designed to ban all hot cargo agreements, close the three loopholes in Taft-Hartley identified above, and prohibit secondary customer picketing at retail stores which sell a product produced by a manufacturer with whom the union has a primary dispute. The Senate bill applied only to certain hot cargo agreements. It contained no provisions regarding the three Taft-Hartley loopholes or secondary customer picketing. The conference agreement indicates that the House provision as to hot cargo agreements was adopted with certain exceptions and that the three Taft-Hartley loopholes were closed as provided for in the House bill. As to secondary customer picketing, the summary analysis states:

Adopts House provision with clarification that other forms of publicity are not prohibited; also clarification that picketing at primary site is not secondary boycott.

105 Cong.Rec. 17,181 (1959), reprinted in 2 Leg.Hist. at 1454; 105 Cong.Rec. 16,539 (1959), reprinted in 2 Leg.Hist. at 1712.

The summary analysis makes it clear that the prohibition on secondary actions directed at consumers restricts only "secondary customer picketing." The summary analysis further points out that the publicity proviso is not an exception which exempts nonpicketing publicity which

Summary analysis of conference agreement as to title VII.
Taft-Hartley amendments

	House bill (Landrum-Griffin)	Senate bill (Kennedy-Ervin)	Conference agreement
I. No man's land	State labor boards and courts could assume jurisdiction and apply State law as to cases declined by NLRB. (Administration recommendation.)	State boards only (12 States) could take jurisdiction - and apply Federal law - to cases declined by NLRB.	Adopts House provision in full. Adds provision to assure that NLRB will continue to take cases falling under its standards as of Aug. 1, 1959; and allows Board to delegate to its regional directors certain powers in representation cases.
II. Hot cargo agreements	Bans all hot cargo agreements.	Bans only hot cargo agreements with motor carriers subject to pt. II of Interstate Commerce Act.	Adopts House provision with modification as to application in garment and construction industries.
III. Other secondary boycotts	1. Closes loophole which permitted secondary boycott through coercion applied directly against secondary employer (instead of his employees). 2. Closes loophole which permitted secondary boycott by inducing employees individually (rather than in concert). 3. Closes loophole which permitted secondary boycotts involving railroads, municipalities, and governmental agencies because their employees were not "employees" under definition in the act. 4. Prohibits secondary customer picketing at retail store which happens to sell product produced by manufacturer with whom union has dispute.	No provision do do do	Adopts House provision. Adopts House provision. Do. Do.
		do	Adopts House provision with clarification that other forms of publicity are not prohibited; also clarification that picketing at primary site is not secondary boycott.

IV. Organizational picketing

1. After an election, bans picketing for 12 months.	Same, except 9 months	Adopts House provision.
2. Bans picketing when another union certified or lawfully recognized.	Same	Same
3. Before election, restricts picketing to reasonable time not to exceed 30 days.	No provision	Adopts House provision.
4. Before election, restricted picketing unless union could show 30 percent interest among employees.	... do	Substitutes mandatory election procedure. Informational picketing which does not affect deliveries or service is not banned.
5. Provides for enforcement through mandatory injunction obtained through NLRB, and/or suit for damages.	Discretionary injunction by NLRB. Union could delay issuance of injunction and continue picketing by charging employer with unfair labor practices.	Mandatory injunction; no damage suit; union can charge unfair practices but cannot block injunction except in limited situations under sec. 3(a)(2).

V. Other provisions:

1. Voting by economic strikers.	Employer could not petition during economic strike for election for 1 year.	Economic strikers could vote without limitation.	Can vote during period of 1 year after strike commences.
2. Prehire, building and construction industry.	Sec. 702. Administration provision.	Broader provision. Sec. 702	Adopts Senate provision.
3. General Counsel, vacancy.	Sec. 704	Same	Same.
4. Priority handling of certain unfair labor charges.	Sec. 706	Same	Same.
5. Common situs, building and construction industry.	No provision	No provision	Dropped.

would otherwise be prohibited by the restrictions in the amendments to § 8(b)(4). Instead, the summary analysis explains that the publicity proviso is a clarification of the fact that the prohibition was never intended to apply to nonpicketing publicity.¹⁶

The summary analysis explains that a "clarification that picketing at primary site is not secondary boycott" was also added to § 8(b)(4). Just as the proponents of the amendments to § 8(b)(4) did not intend the language of their amendments to reach picketing at the primary site, they did not intend the language of their prohibitions to reach nonpicketing publicity.¹⁷ In both cases the summary analysis uses the term "clarification" to describe

¹⁶ Regarding the publicity proviso, the Supreme Court in its *Tree Fruits* opinion stated:

[T]he Senate conferees refused to accede to the House proposal without safeguards for the right of unions to appeal to the public, even by some conduct which might be "coercive." The result was the addition of the proviso. But it does not follow from the fact that some course of conduct was protected by the proviso, that the exception "other than picketing" indicates that Congress had determined that all consumer picketing was coercive.

Tree Fruits, 377 U.S. at 69, 84 S.Ct. at 1070. It seems that the Supreme Court suggested, in dictum, that the publicity proviso exempted nonpicketing publicity which would have been coercive and therefore violative of the amendments to § 8(b)(4). It is true that several Senators and Congressmen feared that nonpicketing publicity might be covered by the prohibition against "coercive" conduct. However, as pointed out above, the fears and doubts of the opposition are not authoritative as to the scope of the prohibition. As discussed more fully above, nowhere in the legislative history is there any indication that the sponsors of the amendments to § 8(b)(4) intended to restrict nonpicketing labor publicity.

¹⁷ The Supreme Court has stated that in order that the amendments to § 8(b)(4) "not be read as supporting a construction of the statute as prohibiting the incidental effects of

the provisos. Neither proviso was an exception; instead they were added to make clear that the prohibitory language does not reach primary picketing or nonpicketing publicity.¹⁸

17 (Continued)

traditional primary activity, Congress added the proviso that nothing in the amended section 'shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.' Many statements and examples proffered in the 1959 debates confirm this congressional acceptance of the distinction between primary and secondary activity." *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 632-33, 87 S.Ct. 1250, 1262, 18 L.Ed.2d 357 (1967) (footnotes omitted). Thus, one of § 8(b)(4)'s provisos was certainly not drafted as an exception, but rather as an explanation of Congress' intent not to reach such conduct by its prohibition.

¹⁸ Because of the publicity proviso, there has been little occasion for courts to consider whether nonpicketing publicity is prohibited by the statute. However, the NLRB argues that two circuit courts of appeal have indicated that handbilling in support of a total boycott is coercive within the meaning of § 8(b)(4)(ii)(B). In *Great Western Broadcasting Corp. v. NLRB*, 356 F.2d 434 (9th Cir.), cert. denied, 384 U.S. 1002, 86 S.Ct. 1924, 16 L.Ed.2d 1015 (1966), the Ninth Circuit affirmed a Board decision that certain publicity fell within the publicity proviso. However, the Ninth Circuit included the following dictum in its opinion:

The prohibition set forth in § 8(b)(4)(ii)(B) covers the cited union activity, else KXTV would not have a case to begin with.

Id. at 436. This quote is mere dictum given that the Ninth Circuit had already decided that the challenged activity was permissible in light of the publicity proviso. In *Honolulu Typographical Union v. NLRB*, 401 F.2d 952 (D.C.Cir.1968), the D.C. Court of Appeals enforced a decision and order of the Board that picketing and handbilling on a secondary site was unlawful. However, the court of appeals did not address the question of whether handbilling was prohibited by the statute. It merely assumed this, focusing instead on whether the handbilling was truthful for the purposes of falling within the scope of the publicity proviso. *Id.* at 957-58.

Moreover, the publicity proviso is not drafted in the terms of an exception. Instead, it is drafted as an interpretive, explanatory section. The publicity proviso begins as follows: "Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity other than picketing...." The fact that the publicity proviso says "nothing... shall be construed to prohibit publicity" indicates that this proviso only explains how the prohibitions of the statute should be interpreted rather than creating an exception to the prohibitions contained in the statute. (Emphasis added).¹⁹

After the conference was complete, Senator Kennedy, a proponent of the publicity proviso, and Senator Goldwater, a proponent of the amendments to § 8(b)(4) engaged in the following colloquy:

MR. KENNEDY. [Discussing the conference agreement]

....

Accordingly, the Senate conferees insisted that the report secure the following rights:

....

(c) The right to appeal to consumers by methods other

¹⁹ In *DeBartolo I*, the Supreme Court stated "when Congress legislates in a fashion that restricts communicative activity, it expects the statutory language to be construed narrowly." 463 U.S. at 157 n. 10, 103 S.Ct. at 2933 n. 10 (citation omitted). The Court continued, "It does not, however, expect the statutory language to be deprived of substantial practical effect." *Id.* The NLRB argues that if § 8(b)(4) is construed to apply to nonpicketing publicity, the publicity proviso will have been deprived of "substantial practical effect." This would be true if the publicity proviso were indeed an exception to a statutory prohibition which had been designed to cover both picketing and non-picketing labor publicity. However, the language of

(Footnote continued on the following page)

than picketing asking them to refrain from buying goods made by nonunion labor and to refrain from trading with a retailer who sells such goods.

Under the Landrum Griffin Bill it would have been impossible for a union to inform the customers of a secondary employer that employer or store was selling goods which were made under racket conditions or sweatshop conditions, or in a plant where an economic strike was in progress. We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but we were able to persuade them to agree that the union shall be free to conduct informational activities short of picketing. In other words, the union can hand out handbills at the shop, can place advertisements in the newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory pick-

19 (Continued)

the proviso and the legislative history make it abundantly clear that the proviso was a "clarification" of the reach of the statutory prohibition and that the proponents of the amendments to § 8(b)(4) never intended to reach non-picketing publicity.

Moreover, the Supreme Court premised its statement that statutory language should not be "deprived of substantial practical effect" on the assumption that the statutory language in question was designed to "restrict [] communicative activity." The proviso was not designed to restrict communicative activity; only the prohibitions of § 8(b)(4) were intended to do so. Although, under our narrow construction of the prohibitions set out in § 8(b)(4), handbilling is not restricted, the portions of the amendments to § 8(b)(4) which restrict communicative activity continue to have substantial practical effect—they regulate picketing, strikes, threats to employers, etc.

Thus, our decision does not interpret any portion of § 8(b)(4) as meaningless verbiage. The restrictive sections of the statute were intended to proscribe many union activities and continue to do so. The publicity proviso was intended to allay the fears of the opponents of the restrictions and clarify the interpretation of the restrictions.

eting in front of a secondary site.

MR. GOLDWATER. Mr. President, will the Senator yield at that point for a question?

MR. KENNEDY. I yield.

MR. GOLDWATER. I have been asked by the people who are vitally concerned whether there is anything in the conference report which would limit or prohibit the buy-America campaigns which are being carried on by certain unions and business groups, and even by some governmental bodies. I should like to ask the distinguished chairman of the conference committee whether the report was intended to have this effect. It is certainly my conviction that no such effect was intended, either by the Senate or by the conferees.

MR. KENNEDY. I know that a good deal of effort has been made by some groups of workers, such as those who work on hats, to make sure that their working standards are protected. The answer to the Senator's question is no, it was not intended that the conference report have such an effect. I am glad that we have had the opportunity to establish legislative history in this matter.

105 Cong.Rec. 16,413-14 (1959), *reprinted in* 2 Leg.Hist. at 1431-32. Just as the summary analysis introduced by Senator Goldwater and Rep. Griffin indicated that the publicity proviso was a "clarification that other forms of publicity are not prohibited," Senator Kennedy's initial statement above indicates that he believed that the publicity proviso meant that "the union shall be free to

conduct informational activity short of picketing.”²⁰ The above colloquy also points out Senator Goldwater’s concerns that the prohibitions of the statute not affect free speech.²¹

²⁰In analyzing the conference committee’s work, Senator Kennedy stated:

Secondly, the House Bill prohibited the union from carrying on any kind of activity to disseminate informational material to secondary sites. They could not say that there was a strike in a primary plant. We quite obviously are opposed to their affecting liberties in a secondary strike or affecting employees joining, but the House language prohibited not only secondary picketing, but even the handing out of handbills or even taking out an advertisement in a newspaper. Under the language of the conference, we agreed there would not be picketing at a secondary site. What was permitted was the giving out of handbills or information through the radio, and so forth.

105 Cong.Rec. 16,254-55 (1959), *reprinted in* 2 Leg.Hist. at 1388-89. The NLRB argues because Senator Kennedy was acting as chairman of the conference committee and recommending the conference committee’s version of the amendments to the NLRA, his statements were not those of an opponent of the amendments to § 8(b)(4) but, rather, are entitled to authoritative weight. However, Senator Kennedy was never a proponent of amendments to § 8(b)(4). His Senate bill did not contain such amendments. It was the bill which had originated in the House, the Landrum-Griffin bill, which contained such restrictions. It is clear that Senator Kennedy’s description of the scope of the restrictions contained in the amendments to § 8(b)(4) was made in light of his fears that those restrictions might be interpreted to preclude nonpicketing publicity—fears which were allayed by the construction of the restrictions detailed in the publicity proviso. It is still fair to say that Senator Kennedy’s “fears and doubts . . . are no authoritative guide to the construction of [the] legislation.” *Tree Fruits*, 377 U.S. at 66, 84 S.Ct. at 1068.

²¹First Amendment considerations had been placed before the Senate during preconference debates by, among others, Senator Humphrey:

The Board has indeed held that to place an employer

(Footnote continued on the following page)

In speaking in support of the conference bill, Senator Goldwater, a member of the conference committee and an ardent supporter of the amendments to § 8(b)(4), stated:

The Senate bill did not deal with the subject of secondary boycotts. The House bill, however, closed up every loophole in the boycott section of the law including the use of a secondary picket line, an example of which the President gave on his nationwide TV program on August 6.

105 Cong.Rec. 16,419 (1959), *reprinted in* 2 Leg.Hist. at 1437. Thus, again a proponent of the amendments to § 8(b)(4) indicated, while the final version of the bill was pending, that prohibition extended only to picketing. Senator Goldwater made no mention of nonpicketing distribution of publicity in explaining why the amendments to § 8(b)(4) were necessary.

Similarly, in speaking in support of the conference bill, Senator Curtis, a proponent of the amendments to

²¹ (Continued)

on a “We Do Not Patronize” list is to restrain and coerce him. The Court of Appeals for the Ninth Circuit set aside the Board’s determination and pointed out that the union’s conduct was “within the general area of protection of the first amendment guaranteeing free speech.” (*NLRB v. IAM, Local 942, CA9, No. 15, 814, Feb. 4, 1959, sl. op. p. 6*). I fear that this proposal may well invade this area. I ask the Senate to hold with Chief Justice Stone that the “publication, unaccompanied by violence, of a notice that the employer is unfair to organized labor and requesting the public not to patronize him is an exercise of the right of free speech guaranteed by the first amendment which cannot be made unlawful by an act of Congress.” The citation is a familiar one to lawyers and even to some of us laymen: *United States v. Hutcheson*, 312 U.S. 219, 243, [61 S.Ct. 463, 471, 85 L.Ed. 788].

105 Cong.Rec. 5580 (1959), *reprinted in* 2 Leg.Hist. at 1037.

§ 8(b)(4), stated:

The objectives of the secondary boycott provisions of the bill before us are substantially the same as those contained in the bills which I have introduced over the past several years. In a word, the overall objective has been to close the loopholes that had developed in the secondary boycott protection afforded by the Taft-Hartley Act.

105 Cong.Rec. 16,423 (1959), reprinted in 2 Leg.Hist. at 1441. It is clear that the major purpose of the amendments remained the closing of the loopholes in Taft-Hartley and that nonpicketing publicity was not a target of the prohibitions.

In summary, we can ascertain no affirmative intention of Congress clearly expressed to prohibit nonpicketing labor publicity. As pointed out in *Tree Fruits*, it was only in the later debates of the labor reform bill, after President Eisenhower had focused attention on consumer picketing of a retail distributor of a struck manufacturer, that both houses began to consider that the amendments should apply to consumer picketing. Nowhere, except in the statements of the opposition, is there any suggestion that the amendments to § 8(b)(4) would prohibit nonpicketing labor publicity.

V.

In conclusion, we cannot find any indication that the entirely peaceful and orderly distribution of handbills, as in the instant case, was intended to be proscribed by Congress. We therefore apply the rule of *Catholic Bishop*, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979), to the effect that before interpreting this statute in a manner that "would give rise to serious constitutional questions," *id.* at 501, 99 S.Ct. at 1319, we must first find "the affirmative intention of the Congress clearly expressed." *Id.* Absent such a finding we must GRANT the Union's petition for review and DENY enforcement of the order of the Board.

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

FLORIDA GULF COAST
BUILDING TRADES
COUNCIL, AFL - CIO

and

THE EDWARD J. DEBARTOLO
CORPORATION

Case 12 - CC - 1062

SUPPLEMENTAL DECISION AND ORDER

On 30 September 1980 the National Labor Relations Board issued a decision in this proceeding¹ finding that the Respondent, Florida Gulf Coast Building Trades Council, AFL - CIO, did not violate Section 8(b)(4)(ii)(B) of the National Labor Relations Act by distributing handbills urging a consumer boycott of a mall owner and all mall tenants. The Respondent had a primary labor dispute with H. J. High Construction Company (High), which had contracted to construct a store at the mall for H. J. Wilson Co. (Wilson's). Although the Respondent had no labor dispute with mall owner The Edward J. DeBartolo Corporation (DeBartolo), Wilson's, or any mall tenants, the Board reasoned that there was a "symbiotic" relationship between DeBartolo and its tenants and that they all would derive a substantial benefit from the "product" High was constructing for Wilson's. The Board concluded that High's contribution to the shopping center enterprise made it a "producer" within the meaning of that term as used in the publicity proviso of Section 8(b)(4) and therefore the proviso protected the Respondent's handbilling. The Board did not decide whether the handbilling constituted "coercion" or "restraint" within the meaning of Section

¹ 252 NLRB 702 (1980).

8(b)(4) or pass on the Respondent's contention that the first amendment protected it.² On 20 October 1981 the United States Court of Appeals for the Fourth Circuit enforced the Board's decision.³

On 24 June 1983, after having granted certiorari, the Supreme Court rejected the Board's "symbiotic relationship" analysis and held that the Board erred in concluding that the handbills came within the publicity proviso's protection. The court declined to decide whether the first amendment protected the Respondent's conduct. Noting that the Board did not decide whether the handbilling fell within the "coercion" or "restraint" terms of Section 8(b)(4)(ii)(B), the Court stated that, until that statutory question was resolved, review of the constitutional question was premature. Accordingly, the court vacated the court of appeal's judgment and remanded the case for further proceedings consistent with its opinion.

On 2 November 1983 the Board advised the parties of their right to file statements of position regarding the issues the remand raised. Thereafter, DeBartolo, the General Counsel, and the Respondent filed statements of position with the Board. The Associated General Contractors of America (AGC) moved for permission to file an amicus curiae brief.⁴

Pursuant to the Supreme Court's direction, we consider whether Section 8(b)(4)(ii)(B) prohibits the Respondent's conduct. We first briefly summarize the facts. High began building a store for Wilson's at East Lake Square Mall in late 1979. The Respondent claimed High paid substandard compensation to its employees. On 13 December 1979 the Respondent began distributing hand-

² Member Penello dissented on the ground that the Board should not have accepted the parties' stipulated record.

³ 662 F.2d 264 (1981).

⁴ We grant the AGC's motion and accept its brief.

bills to potential customers at all four entrances to the mall. The handbills stated:

**PLEASE DON'T SHOP AT EAST LAKE SQUARE
MALL PLEASE**

The FLA. GULF COAST BUILDING TRADES COUNCIL, AFL - CIO is requesting that you do not shop at the stores in the East Lake Square Mall because of the Mall ownership's contribution to substandard wages.

The Wilson's Department Store under construction on these premises is being built by contractors who pay substandard wages and fringe benefits. In the past, the Malls owner, The Edward J. DeBartolo Corporation, has supported labor and our local economy by insuring that the Mall and its stores be built by contractors who pay fair wages and fringe benefits. Now, however, and for no apparent reason, the Mall owners have taken a giant step backwards by permitting our standards to be torn down. The payment of substandard wages not only diminishes the working persons's [sic] ability to purchase with earned, rather than borrowed, dollars, but it also undercuts the wage standard of the entire community. Since low construction wages at this time of inflation means decreased purchasing power, do the owners of East Lake Mall intend to compensate for the decreased purchasing power of workers of the community by encouraging the stores in East Lake Mall to cut their prices and lower their profits?

**CUT-RATE WAGES ARE NOT FAIR UNLESS
MERCHANDISE PRICES ARE ALSO CUT-RATE.**

We ask for your support in our protest against substandard wages. Please do not patronize the stores in the East Lake Square Mall until the Mall's owner publicly promises that all construction at the Mall will be done using contractors who pay their employees fair wages and fringe benefits.

IF YOU MUST ENTER THE MALL TO DO BUSINESS, please express to the store managers your concern over substandard wages and your support of our efforts.

We are appealing only to the public—the consumer. We are not seeking to induce any person to cease work or to refuse to make deliveries.

The Respondent continued handbilling until 4 January 1980, when the Thirteenth Judicial Circuit, Hillsborough County, Florida, enjoined its conduct.

Section 8(b)(4)(ii)(B) provides that a labor organization commits an unfair labor practice by threatening, coercing, or restraining any person engaged in commerce (the secondary employer), if an object is to force or require the secondary employer to stop dealing in the products of or to cease doing business with any other person (the primary employer).⁶ We find that Section 8(b)(4)(ii)(B) proscribed the Respondent's conduct.

In *Television Artists AFTRA Local 55 (Great Western Broadcasting)*, 150 NLRB 467 (1964), enfd. 356 F.2d 434 (9th Cir. 1966), in response to the Ninth Circuit's remand instructions to determine whether handbilling and other activity urging a consumer boycott constituted coercion, 310 F.2d 591 (1962), the Board held that such activity was coercive. In *Typographical Union 37 (Hawaii Press)*, 167 NLRB 1030 (1967), enfd. 401 F.2d 952 (D.C. Cir. 1968), the Board cited with approval *Great Western's* statement

⁶The statute reads in relevant part: "It shall be an unfair labor practice for a labor organization or its agents . . . to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . . forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person."

that handbills appealing to the public not to patronize neutral employers constitute coercion violative of Section 8(b)(4)(ii)(B). See also *Service Employees Local 399 (Delta Air Lines)*, 263 NLRB 996 (1982); *Electrical Workers IBEW Local 662 (Middle South Broadcasting)*, 133 NLRB 1968 (1961).⁶

In sum, we find that the Respondent, by distributing handbills requesting the public not to patronize mall tenants because High allegedly pays substandard wages and fringe benefits to its employees constructing a store for Wilson's, coerced the mall tenants, and that an object of the Respondent's conduct was to force the mall tenants to cease doing business with DeBartolo in order to force DeBartolo and/or Wilson's not to do business with High.⁷ Having found that the Respondent engaged in conduct coercive within the meaning of Section 8(b)(4)(ii), we conclude that the Respondent violated Section 8(b)(4)(ii)(B) of the act.⁸

The Respondent contends that the first amendment

⁶In *Middle South Broadcasting*, the judge reviewed the Taft-Hartley legislative history and concluded that the threats directed at secondary employers Congress intended to prohibit included, in addition to strikes and picketing, "other economic retaliation." Appealing to the public not to patronize secondary employers is an attempt to inflict economic harm on the secondary employers by causing them to lose business. As the case law makes clear, such appeals constitute "economic retaliation" and are therefore a form of coercion.

⁷We will not determine whether the Respondent's conduct coerced DeBartolo on a stipulated record in which the complaint does not so allege.

⁸The Respondent asked customers to forgo shopping at the mall entirely; it did not merely ask them not to deal with High. Thus, it did not limit its appeal to the "struck product," and its conduct does not fall within the privilege to engage in product boycotts recognized in *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58 (1964).

protects its handbilling and urges that we dismiss the complaint in order to avoid a conflict with the Constitution. We are persuaded, however, that the statute's literal language and the applicable case law require that we find a violation. We shall not consider the question whether the first amendment protects the Respondent's conduct because we find that the Act prohibits it. The court did not ask us to consider such an issue, and as a Congressionally created administrative agency we will presume the constitutionality of the Act we administer. We find that Congress, in enacting Section 8(b)(4)(ii)(B), intended to proscribe the Respondent's conduct, and we presume that this proscription accords with the Constitution.⁹

⁹ *Delta Airlines*, 263 NLRB at 999.

Conclusions of Law

By distributing handbills urging potential customers not to shop at East Lake Square Mall, the Respondent has coerced the mall tenants with an object of forcing the mall tenants to cease doing business with DeBartolo in order to force DeBartolo and/or Wilson's to cease doing business with High, thereby violating Section 8(b)(4)(ii)(B) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Florida Gulf Coast Building Trades Council, AFL-CIO, Tampa, Florida, its officers, agents, and representatives, Shall

1. Cease and desist from

(a) Coercing the mall tenants by distributing handbills urging potential customers not to shop at East Lake Square Mall, with an object of forcing the mall tenants to cease doing business with DeBartolo in order to force DeBartolo and/or Wilson's to cease doing business with High.

(b) In any like or related manner restraining or coercing the East Lake Square Mall tenants, with an object of forcing them to cease doing business with DeBartolo in order to force DeBartolo and/or Wilson's to cease doing business with High.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its offices and meeting places copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized repre-

¹⁰ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED

(Footnote continued on the following page)

sentative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and return to the Regional Director sufficient copies of the notice for posting by DeBartolo and its mall tenants, if willing, at places where notices to employees are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C.

15 January 1985

Donald L. Dotson, Chairman

Robert P. Hunter, Member

Patricia Diaz Dennia, Member
NATIONAL LABOR
RELATIONS BOARD

10 (Continued)

BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coerce the mall tenants by distributing handbills urging potential customers not to shop at East Lake Square Mall, with an object of forcing mall tenants to cease doing business with The Edward J. DeBartolo Corporation in order to force DeBartolo and/or H. J. Wilson Co. to cease doing business with H. J. Construction Company.

WE WILL NOT in any like or related manner restrain or coerce the East Lake Square Mall tenants, with an object of forcing them to cease doing business with DeBartolo in order to force DeBartolo and/or Wilson's to cease doing business with High.

FLORIDA GULF COAST BUILDING
TRADES COUNCIL, AFL - CIO

(Labor Organization)

Dated: _____ By: _____

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

No. 85-3172

D.C. Docket No. 273-172

**FLORIDA GULF COAST BUILD-
ING AND CONSTRUCTION
TRADES COUNCIL,**

*Petitioner,
Cross-Respondent,*

versus

**NATIONAL LABOR RELA-
TIONS BOARD,**

*Respondent,
Cross-Petitioner.*

Petition for Review and
Cross -Application for
Enforcement of an
Order of the National
Labor Relations Board

Before
Hill and Anderson*
Circuit Judges,
and Tuttle,
Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the petition of Florida Gulf Coast Building and Construction Trades Council for review of an order and the National Labor Relations Board's application for enforcement of its order, and was argued by counsel;

It is now here ordered and adjudged by this Court that the Union's petition for review in this cause be and the same is hereby, GRANTED; and the application for enforcement of the National Labor Relations Board's order in this cause be, and the same is hereby, DENIED;

¹¹ ANDERSON, Circuit Judge, was a member of the panel, but took no part in the consideration or decision of this case. This case was decided by a quorum. 28 U.S.C. 46(d).

It is further ordered that respondent/cross-petitioner pay to petitioner/cross-respondent, the costs on appeal to be taxed by the Clerk of this Court.

Entered: August 11, 1986
For the Court: Miguel J. Cortez, Clerk

By: _____
Deputy Clerk

ISSUED AS MANDATE: NOV 24, 1986

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

No. 85-3172

**FLORIDA GULF COAST BUILD-
ING AND CONSTRUCTION
TRADES COUNCIL,**

*Petitioner,
Cross-Respondent,*

versus

**NATIONAL LABOR RELA-
TIONS BOARD,**

*Respondent,
Cross-Petitioner.*

Petition for Review and
Cross-Application for
Enforcement of an
Order of the National
Labor Relations Board

Before
Hill and Anderson*
Circuit Judges,
and Tuttle,
Senior Circuit Judge.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARSING EN BANC

(Opinion 8/11/86, 11 Cir., 198___, ___ F.2d ___)

PER CURIAM:

☒ The Petition for For Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

☐ The Petition for For Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who

* Judge Anderson, was a member of the panel, but took no part in the consideration of this case. This case is being decided by a quorum. 28 U.S.C. 46.

are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure: Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also being DENIED.

☐ A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

JAMES C. HILL

United States Circuit Judge

Supreme Court of the United States

No. A-543

EDWARD J. DeBARTOLO CORPORATION,
Applicant,

v.

FLORIDA GULF COAST BUILDING AND
CONSTRUCTION TRADES COUNCIL

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including March 11, 1987.

/s/ Lewis F. Powell, Jr.

Associate Justice of the Supreme
Court of the United States

Dated this 28th
day of January, 1987.

APPENDIX B -

CONSTITUTIONAL PROVISION AND STATUTE

UNITED STATES CONSTITUTION

Amendment I [1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CODE

Title 29

§ 158. Unfair labor practices

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues

and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor or-

ganization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member

of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c) (1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election

in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

Appendix C

List of Parent Companies, Subsidiaries and Affiliates

Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, petitioner, Edward J. DeBartolo Corporation submits the following list as its parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates.

Balmoral Park Trot
 Louisiana Downs, Inc.
 Pittsburgh Penguins, Inc.
 Red River Downs, Inc.
 Alderwood Associates
 Canyon Mall Venture
 Culter Ridge Associates
 DeBartolo-Orlando Associates
 Fun-N-Games Associates
 Great Lakes Plaza Associates
 Lake Charles Associates
 Marco Bay Associates
 Margate Associates
 Pitts-Debart Hist. Assoc.
 Palm Beach Peripheral Assoc.
 Poydras Square Associates
 REC Enterprises
 Ward Plaza Associates
 Altamonte Mall Associates
 Century III Associates
 Cheltenham Shop Center
 Eastlake Square Associates
 H-Castleton
 Macedonia Plaza Associates
 Mission Viejo Associates
 North Park Associates

North Plaza Associates
 Pinellas Square Associates
 Pratt/Debartolo Assoc. Orlando
 Pratt/Debartolo Assoc. Pittsburgh
 Red Bird Mall Associates
 Royalton Road, Joint Venture
 South Plaza Associates
 Southcoast-Desoto Associates
 Southcoast-Volusia Associates
 Stonebridge Mall Ltd.
 University Square Associates
 Aventura Mall Venture
 Boynton Associates
 Boynton JCP Associates
 Boynton Peripheral Associates
 Brickell Bay Office Tower Associates
 Centennial Square Assoc, Ltd.
 Chateau Grove Ltd.
 DeBartolo Citrus Co.
 DeBartolo Energy Associates, II
 DeBartolo Energy Ltd.
 DeBartolo Hotel Associates
 Florida Mall Associates
 Florida Mall Peripheral Associates
 King Arthur Associates
 La Plaza Del Associates
 Lakeland Square Associates
 Orlando West Associates
 Pine Ridge Associates
 Pine Tree Associates
 Pratt/Debartolo Assoc., Palm Springs
 Pratt/Debartolo Assoc., N.Orleans
 Pratt/North Plaza Associates

Randall Park Associates
 South Bend Associates
 Southpark Associates
 Stuart Square Periph Associates
 Swifton Shopping Center Associates
 University Center Associates
 University Park Associates
 University Square Peripheral Associates
 7620 Associates
 Baltimore Football, Inc.
 Beachwood Associates
 Bradenton R/E trust
 Brandon Town Center Associates
 Brunswick-Mentor Associates
 Canyon Springs North Venture
 Canyon Springs Periph Associates
 Centennial Associates
 Chesapeake Associates
 Chesapeake Associates
 Chesapeake-JCP Associates Ltd
 Coral Square Associates
 Coral Square Promenade Associates
 Coral-CS Associates, Ltd.
 Crow DeBartolo Roland, Ltd
 DeBartolo Asheville Assoc.
 DeBartolo Brandon Associates
 DeBartolo Energy III Associates
 DeBartolo Energy IV Associates
 DeBartolo Energy V Associates
 DeBartolo Energy VI Associates
 DeBartolo Energy VII Associates
 DeBartolo Energy VIII Associates
 DeBartolo Energy IX Associates

DeBartolo Energy X Associates
 DeBartolo Nashville Associates
 DeBartolo Nashville Assoc. II
 DeBartolo-Miami Associates
 DeBartolo/Grant ST Associates
 DeBartolo/LDS Associates
 DeBartolo/S & V Associates
 Deroland Associates
 E.J.D. & Assoc. Co.
 Fresno Beverage Company
 Gulf View Associates
 H-D Lakeland Mall, Joint Venture
 Lake Pierce Groves
 Lima Plaza Associates
 Melbourne JCP Associates, Ltd.
 Melbourne Peripheral Associates
 Melbourne Square Associates
 Miami Peripheral Associates
 Naples Land Associates
 Nashville Center Associates
 Nashville Center Associates II
 New Atlantis Associates
 O'Conner Associates
 Olympia Park Associates
 Olympia Park Peripheral Associates
 Olympia Peripheral Associates
 Pittsburgh Maulers
 Regency Mall Associates
 Remington Peripheral Associates
 Sacramento Associates
 San Francisco Forty Niners, Ltd.
 Sawyer Road Associates
 Struthers-Poland Land Assoc.

Sunroof Associates

Treasure Coast Associates

Treasure Coast - JCP Assoc. Ltd.

TSY Associates

W.J.D. Associates

Washington Plaza Associates

Wilson Mills Associates

DeBartolo, Inc.

OPPOSITION BRIEF

(8)
No. 86-1461

Supreme Court, U.S.

FILED

MAY 12 1987

JOSEPH F. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD J. DEBARTOLO CORP., PETITIONER

v.

FLORIDA GULF COAST BUILDING
AND CONSTRUCTION TRADES COUNCIL
AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel
National Labor Relations Board
Washington, D.C. 20570

10 PM

TABLE OF AUTHORITES

	Page
Cases:	
<i>Boxhorn's Big Muskego Gun Club v. Electrical Workers Local 494</i> , 798 F.2d 1016 (7th Cir. 1986)	6, 7
<i>Edward J. DeBartolo Corp. v. NLRB</i> , 662 F.2d 264 (4th Cir. 1981), rev'd, 463 U.S. 147 (1983)	1, 2, 3
<i>Florida Gulf Coast Building Trades Council</i> , 252 N.L.R.B. 702 (1980)	3
<i>Ford Motor Co. v. NLRB</i> , 441 U.S. 448 (1979)	8
<i>Hospital & Service Employees, Local 399</i> , 263 N.L.R.B. 996 (1982)	8
<i>NLRB v. Catholic Bishop</i> , 440 U.S. 490 (1979)	5
<i>NLRB v. Fruit & Vegetables Packers & Warehousemen, Local 760</i> , 377 U.S. 58 (1964)	6, 7
<i>NLRB v. Retail Store Employees</i> , 447 U.S. 607 (1980) ...	6, 7
<i>Pattern Makers League v. NLRB</i> , 473 U.S. 95 (1985)	8
<i>United Steelworkers</i> , 244 N.L.R.B. 96 (1979), rev'd <i>sub nom. Pet., Inc. v. NLRB</i> , 641 F.2d 545 (8th Cir. 1981)	8
Constitution and statute:	
U.S. Const. Amend. I	4
National Labor Relations Act, 28 U.S.C. (& Supp. III) 151 <i>et seq.</i> :	
§ 8(b)(4), 29 U.S.C. 158(b)(4)	3
§ 8(b)(4)(ii)(B), 29 U.S.C. 158(b)(4)(ii)(B)	1, 2, 3, 4, 6, 7, 8

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1461

EDWARD J. DeBARTOLO CORP., PETITIONER

v.

FLORIDA GULF COAST BUILDING
AND CONSTRUCTION TRADES COUNCIL
AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

Petitioner challenges the court of appeals' holding that the secondary boycott provisions of Section 8(b)(4)(ii)(B) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(b)(4)(ii)(B), allow a union to distribute handbills urging consumers not to patronize any of the tenants of a shopping mall because the union is involved in a labor dispute with a company constructing a building for one tenant in that mall.

1. The facts of this case are detailed in this Court's opinion in *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147, 148-153 (1983) (*DeBartolo I*). Briefly, petitioner, the Edward J. DeBartolo Corp., owns and operates a large shopping mall in Tampa, Florida (*id.* at 149). The mall has approximately 85 retail tenants (*ibid.*). One of those tenants, the H.J. Wilson Company (Wilson), retained the H.J. High Construction Company (High) to build a store for it in the mall (*ibid.*). High became involved in a primary labor dispute with respondent union, the Florida

Gulf Coast Building and Construction Trades Council, AFL-CIO, over High's payment of allegedly substandard wages and benefits (*id.* at 150). During the course of this dispute, respondent union distributed handbills at all four entrances of the mall urging consumers not to patronize any of the mall's tenants because of its labor dispute with High (*ibid.*).¹ Petitioner demanded that respondent union modify the handbills to make clear that the labor dispute did not involve petitioner or any tenant other than Wilson and that it limit its activity to the immediate vicinity of Wilson's store (*id.* at 151). When respondent union persisted in distributing the handbills without regard to these limitations, petitioner filed an unfair labor practice charge with the National Labor Relations Board (NLRB) (*ibid.*).

Based on this charge, the General Counsel of the NLRB issued a complaint alleging that respondent union's handbilling violated Section 8(b)(4)(ii)(B) of the NLRA, which bars a labor organization from "coerc[ing]" or "restrain[ing]" any person with the object of "forcing or requiring [that] person to cease * * * dealing in the products of any other producer * * *" (29 U.S.C. 158(b)(4)(ii)(B) (*DeBartolo I*, 463 U.S. at 151)).² But the NLRB, without

¹ The text of the handbills is reprinted in *DeBartolo I*, 463 U.S. at 150 n.3, and at Pet. App. 40a-41a.

² Section 8(b)(4)(ii)(B) provides in full (29 U.S.C. 158(b)(4)(ii)(B)) that "[i]t shall be an unfair labor practice for a labor organization or its agents —

* * * * *

(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is —

* * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *.

deciding whether the handbilling constituted a form of "coercion" or "restraint" proscribed by Section 8(b)(4)(ii)(B), held (see 463 U.S. at 151-152) that respondent union's handbilling was protected by the "publicity proviso" to Section 8(b)(4) and that the complaint should be dismissed.³ The NLRB reasoned that petitioner and its tenants, including Wilson, would all derive a substantial benefit from the "product" that High was constructing, namely Wilson's store, and, accordingly, that this consumer publicity was directed at a "producer" within the meaning of the proviso. See *Florida Gulf Coast Building Trades Council (Edward J. DeBartolo Corp.)*, 252 N.L.R.B. 702, 705 (1980). The Fourth Circuit affirmed (*Edward J. DeBartolo Corp. v. NLRB*, 662 F.2d 264 (1981)), but this Court reversed that judgment. (*DeBartolo I*, 463 U.S. 147 (1983)).

The Court in *DeBartolo I* identified the critical question as "whether the handbilling 'advis[ed] the public * * * that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer'" (463 U.S. at 154). It then noted that the NLRB had "not [found] that any product produced by High was being distributed by [petitioner] or any of Wilson's cotenants" and that, in finding the

³ The "publicity proviso" states (29 U.S.C. 158(b)(4)) that:

* * * * *

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution[.]

handbilling protected by the publicity proviso, the NLRB instead "relied on the theory that there was a symbiotic relationship between them and Wilson[]" (*id.* at 156). The Court rejected this theory of the publicity proviso, finding that it "would almost strip the distribution requirement of its limiting effect" and that, "if Congress had intended all peaceful, truthful handbilling that informs the public of a primary dispute to fall within the proviso, the statute would not have contained a distribution requirement" (*ibid.* (footnote omitted)). The Court remanded the case so that the NLRB could determine whether respondent union's handbilling violated Section 8(b)(4)(ii)(B) apart from the publicity proviso; and it refused to decide whether a ban on such handbilling would violate the First Amendment until this statutory question had been decided (463 U.S. at 156-158).

2. On remand, the NLRB held (Pet. App. 38a-46a) that the handbilling violated Section 8(b)(4)(ii)(B). The NLRB found that "[r]espondent [union], by distributing handbills requesting the public not to patronize mall tenants because High allegedly pays substandard wages and fringe benefits to its employees constructing a store for Wilson's, coerced the mall tenants, and that an object of the [r]espondent[] [union's] conduct was to force the mall tenants to cease doing business with [petitioner] in order to force [petitioner] and/or Wilson's not to do business with High" (Pet. App. 42a (footnote omitted)). It refused, however, to "consider the question whether the first amendment protects the [r]espondent[] [union's] conduct," reasoning that "the statute's literal language and the applicable case law require that we find a violation," that "[t]he [C]ourt did not ask us to consider such an issue," and that, "as a Congressionally created administrative agency[,] we will presume the constitutionality of the Act we administer" (*id.* at 42a-43a). It then issued an order

directing respondent union to cease and desist from distributing handbills and to post an appropriate notice (*id.* at 44a-45a).

3. On appeal, the Eleventh Circuit denied enforcement of the NLRB's order (Pet. App. 1a-37a). Initially, the court noted that, if "the statutory interpretation suggested by the [NLRB] would cause serious doubts about the constitutionality of [Section] 8(b)(4)," it would have to find an "affirmative intention of the Congress clearly expressed" to restrict such handbilling" in order to sustain that interpretation (*id.* at 5a-6a, quoting *NLRB v. Catholic Bishop*, 440 U.S. 490, 501 (1979)). Because respondent union's handbilling "involved none of the non-speech elements, *e.g.*, patrolling, which justify restrictions on picketing" (Pet. App. 10a-11a (footnote omitted)), the court then determined that, "if [Section] 8(b)(4)(ii)(B) is construed to prohibit [this] * * * handbilling, serious constitutional questions will arise" (*id.* at 13a (footnote omitted)). On that view, it searched for and was unable to find an "affirmative intent[ion]" on the part of Congress to prohibit such handbilling (*id.* at 15a-37a), reasoning that, while "the prohibition against threatening, coercing, or restraining could be read very broadly," the "language of the statute contains no clear expression of an affirmative intent of Congress to prohibit the distribution of handbills urging a secondary boycott" (*id.* at 15a) and the legislative history indicates "that the proponents of the amendments to [Section] 8(b)(4) had in mind non-consumer picketing and more direct economic actions, *e.g.*, strikes, when they proposed to amend that section by making its restriction apply to [actions that] 'threaten, coerce, or restrain'" (*id.* at 18a-19a). The court rejected the argument of the NLRB that, "if Congress had not intended to restrict non-picketing publicity under [Section] 8(b)(4)(ii)(B), it would not have drafted the publicity proviso" (*id.* at 26a), finding that "the publicity proviso is not drafted in the terms of an exception" but rather in the terms of "an interpretive,

explanatory section" (*id.* at 32a) and that "the legislative history makes it clear that * * * the publicity proviso was inserted both to clarify the[] position that nonpicketing publicity was not prohibited and, most importantly, to allay the fears of opponents of the amendments that such speech would be restricted" (*id.* at 26a).

4. The NLRB agrees with petitioner (Pet. 4-9) that the decision below is in substantial tension with the teachings of both this Court and the Court of Appeals for the Seventh Circuit. This Court has said that the "prohibition of [Section] 8(b)(4) is keyed to the coercive nature of the conduct, whether it be picketing or otherwise" (*NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 68 (1964) (*Tree Fruits*)). It has further stated that, in determining whether the requisite coercion exists, the "critical question * * * [is] whether, by encouraging customers to reject the struck product[s], the secondary appeal is reasonably likely to threaten the neutral party with ruin or substantial loss" (*NLRB v. Retail Store Employees*, 447 U.S. 607, 615 n.11 (1980) (*Safeco*)). And, finally, it has said that, "if Congress had intended all peaceful, truthful handbilling that informs the public of a primary dispute to fall within the proviso, the statute would not have contained a distribution requirement" (*DeBartolo I*, 463 U.S. at 156 (footnote omitted)). In this spirit, the Seventh Circuit has said that "handbilling, too, is coercive or restraining under [Section] 8(b)(4)(ii) when designed to close the whole business" and that "[i]t is not altogether plain * * * that constitutional overtones can be employed to narrow the statute's scope to picketing and nothing but * * *" (*Boxhorn's Big Muskego Gun Club v. Electrical Workers Local 494*, 798 F.2d 1016, 1019, 1024 (1986) (*Boxhorn's Gun Club*)).⁴ The Eleventh Circuit's

⁴ In *Boxhorn's Gun Club*, the Seventh Circuit held that a union violated Section 8(b)(4)(ii)(B) by picketing and distributing handbills that asked consumers to withhold their patronage from a trapshooting

judgment—that Section 8(b)(4)(ii)(B) does not prohibit peaceful and orderly handbilling that urges a total consumer boycott of a neutral employer—is difficult to reconcile with these statements.

Nevertheless, the NLRB elected not to file a petition for a writ of certiorari in this case. There is no direct conflict between the decision below and the decisions of this Court and the Seventh Circuit.⁵ Moreover, on the remand in this case, the NLRB determined that this secondary handbilling urging a total consumer boycott of a neutral employer violated Section 8(b)(4)(ii)(B) without considering the constitutional concerns expressed by the court below. Thus, while the NLRB agrees that the questions presented by this case are important ones (Pet. 4, 9-12), it has decided to reconsider its construction of Section 8(b)(4)(ii)(B) in light of both the constitutional concerns expressed by the court below and the Seventh Circuit's thoughtful discussion of the "coercion" issue.⁶ This Court would clearly

club in order to pressure the club and its general contractor to fire a nonunion subcontractor that was doing remodeling work for the club (798 F.2d at 1018-1019).

⁵ Though the reasoning of this Court and the Seventh Circuit plainly suggests that handbilling urging a total consumer boycott of a neutral employer violates Section 8(b)(4)(ii)(B), there is no square holding to that effect. The judgments in *Tree Fruits* and *Safeco* address only secondary picketing. See *Tree Fruits*, 377 U.S. at 59; *Safeco*, 447 U.S. at 610 n.3. The judgment in *DeBartolo I* addresses only the applicability of the "publicity proviso" to such secondary handbilling. See *DeBartolo I*, 463 U.S. at 153, 157-158. And the Seventh Circuit in *Boxhorn's Gun Club* limited its holding to "handbilling that is part of a course of conduct that includes picketing and blocking the approach of patrons" (798 F.2d at 1024), and expressly distinguished the Eleventh Circuit's decision in this case, which it said concerned "pure handbilling" (*ibid.*).

⁶ In *Boxhorn's Gun Club*, the Seventh Circuit drew a distinction (798 F.2d at 1020-1024) between secondary handbilling and the publication of a photograph of the handbill in the union's newsletter or the placement of the neutral employer on the union's "We Do Not Patronize" list. While the court held that the handbilling in that case

benefit from the NLRB's additional thinking on this subject, whatever the outcome.⁷ See generally *Pattern Makers' League v. NLRB*, 473 U.S. 95, 114-115 (1985); *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979).

Accordingly, the NLRB cannot conclude that this case warrants review.

CHARLES FRIED
Solicitor General

ROSEMARY M. COLLYER
General Counsel
National Labor Relations Board

MAY 1987

was "coercive" within the meaning of Section 8(b)(4)(ii)(B), it also found that the latter two actions were not.

⁷ The NLRB will have an opportunity to address these issues in several cases that are currently pending before it. See, e.g., *Hospital & Service Employees, Local 399 (Delta Airlines)*, 263 N.L.R.B. 996 (1982); *United Steelworkers (Pet., Inc.)*, 244 N.L.R.B. 96 (1979), rev'd sub nom. *Pet., Inc. v. NLRB*, 641 F.2d 545 (8th Cir. 1981).

OPPOSITION BRIEF

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

THE EDWARD J. DEBARTOLO CORP.,
Petitioner,
v.

FLORIDA GULF COAST BUILDING AND
CONSTRUCTION TRADES COUNCIL

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

MEMORANDUM FOR
FLORIDA GULF COAST BUILDING AND
CONSTRUCTION TRADES COUNCIL

MARK F. KELLY
401 South Albany
Tampa, Florida 33606

LAURENCE J. COHEN
1125 15th Street, N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
Counsel of Record

Of Counsel:

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

QUESTIONS PRESENTED

1. Does the entirely peaceful and orderly handbilling (unconnected with any picketing) which is at issue in this case constitute a violation of § 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended?

2. If so, does that provision, as so applied, violate the First Amendment of the United States Constitution?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
DISCUSSION	2

TABLE OF AUTHORITIES

CASES:

<i>Black v. Cutter Laboratories</i> , 351 U.S. 292	11
<i>Boxhorn's Big Moskego Gun Club v. Electrical Workers</i> , 798 F.2d 1016 (C.A. 7)	10
<i>Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837	11
<i>Labor Board v. Fruit Packers</i> , 377 U.S. 58 ("Tree Fruits")	4, 6, 7
<i>Edward J. DeBartolo Corp. v. NLRB</i> , 463 U.S. 147 ("DeBartolo I")	3, 7
<i>Hoffman v. Cement Masons Union Local 337</i> , 468 F.2d 1187 (C.A. 9)	11
<i>Labor Board v. Servette, Inc.</i> , 377 U.S. 46 ("Servette")	4
<i>NLRB v. Catholic Bishop of Chicago</i> , 440 U.S. 490 ..	5
<i>Soft Drink Workers Union, Local 812 v. N.L.R.B.</i> , 657 F.2d 1252 (C.A.D.C.)	11

UNITED STATES CONSTITUTION:

First Amendment	3, 5, 11
-----------------------	----------

STATUTE:

National Labor Relations Act of 1935, 49 Stat. 449, as amended by the Labor-Management Relations Act of 1947, 61 Stat. 136, and the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. §§ 141 <i>et seq.</i>	
§ 8(b) (4)	<i>passim</i>
§ 10(l)	3

MISCELLANEOUS:

Legislative History of the Labor Management Reporting and Disclosure Act of 1959 (NLRB Ed. 1959)	9
--	---

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1461

THE EDWARD J. DEBARTOLO CORP.,
Petitioner,
v.

FLORIDA GULF COAST BUILDING AND
CONSTRUCTION TRADES COUNCIL

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

MEMORANDUM FOR
FLORIDA GULF COAST BUILDING AND
CONSTRUCTION TRADES COUNCIL

This case involves peaceful and orderly handbilling by respondent Florida Gulf Coast Building & Construction Trades Council, AFL-CIO ("the Union"), at the East Lake Square Mall in Tampa, Florida. The Union handbills in question ask consumers at the Mall not to shop at any of the tenant stores "because of the Mall ownership's contribution to substandard wages" and justify that request by a reasoned showing that a store at the Mall (Wilson's) was being constructed by H. J. High Construction Company ("High") at substandard wages and fringe

benefits, that in "the past, the Mall's owner, Edward J. DeBartolo Corp., has . . . insur[ed] that the Mall and its stores be built by contractors who pay fair wages" and that support of the Union's protest could bring a promise "that all construction at the Mall will be done using contractors who pay their employees fair wages and fringe benefits." (Pet. App. 40a.)¹

The Court of Appeals refused to enforce the National Labor Relations Board's determination that the Union's handbills constitute a violation of 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(4) (the so-called "secondary boycott" provision of the NLRA). After an exhaustive review of the statutory materials, that court stated that "we cannot find any indication that the entirely peaceful and orderly distribution of handbills, as in the instant case, was intended to be proscribed by Congress." (Pet. App. 37a.) Accordingly, the Court of Appeals set aside the Board's order without reaching the ultimate question whether the handbill is constitutionally protected (although that court did determine, as part of its analysis, that "serious constitutional questions will arise" if § 8(b)(4)(ii)(B) is construed to prohibit such handbills.) (*Id.* 13a.)

DISCUSSION

The considerations going to whether this case is worthy of this Court's attention are, we believe, in virtual equipoise. The Union's countervailing interests in vindicating its position in this case without the need for further litigation and in providing the assured legal base for future handbilling, should the occasion arise, which only a decision by this Court can provide, are also evenly balanced.

That being so, we do not believe that our mere opinions as to whether certiorari should be granted would be of much aid in the Court's deliberative processes. It may, however, be of assistance to the Court for us to lay

¹ "Pet." will refer to the petition for a writ of certiorari in this case and "Pet. App." will refer to the petition appendix.

out, in as objective a fashion as possible, the relevant considerations; we therefore proceed on that basis.

On the one hand, as the petitioner points out, this is the continuation of the same case that gave rise to *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147 ("DeBartolo I"). In *DeBartolo I* this Court held that the Union's handbill is not protected by the publicity proviso to § 8(b)(4) of the NLRA. The Court, however, expressly reserved two questions: (1) "whether apart from [the publicity] proviso, the Union's conduct fell within the terms of § 8(b)(4)(ii)(B)"; and (2) "whether the handbilling is protected by the First Amendment." See *id.* at 157-58. This proceeding presents those reserved questions; thus, there can be no gainsaying the importance of the issue presented.

Moreover, as we understand matters, the NLRB has not yet determined whether to accept the Court of Appeals' construction of § 8(b)(4)(ii)(B) as correct. For the foreseeable future then, the Board's General Counsel and Regional Directors will continue to issue complaints in future similar cases and under § 10(1) of the NLRA, the Regional Directors will, as they are required to do, seek a District Court injunction—pending the Board's proceedings on the charge—against the alleged unfair labor practice. For reasons that are not presently germane, most District Courts have developed the practice of issuing injunctions in § 10(1) proceedings without inquiring into the ultimate legal merit of the complaint. Union handbills of the kind involved in this case, therefore, remain subject to injunction throughout the United States (except perhaps in the Eleventh Circuit). It is commonplace that given the pace at which labor disputes move, such preliminary injunctions are the practical equivalent of a permanent ban. Thus, so long as the Board adheres to its present position, unions will not be able to engage in a form of communication—and members of the public will be denied the opportunity to receive the unions' mes-

sage—which, in our view, has *not* been banned by Congress and which is protected by the First Amendment. That, we submit, is indefensible.

On the other hand, contrary to petitioner, we believe that the decision below is entirely correct and we cannot discern any conflict among the circuits. While these points are no weightier than the two just reviewed, our basis for so concluding cannot be stated in an intelligible way in only a few words. Since the Court is entitled to be fully informed concerning the factors which affect the exercise of its certiorari jurisdiction, it is necessary to address those two issues at somewhat greater length.

1. The Decision Below Is Correct. Although petitioner contends that the decision below is erroneous (Pet. 4-7), its argument fails utterly to discuss the reasoning whereby the Court of Appeals reached the challenged result.² This tactic is not only unfair to the court below, but to this Court. We therefore seek to fill the resulting vacuum by outlining the basis for that Court's decision.

The Eleventh Circuit began its analysis by quoting this Court's observation, when this case was previously here, that the controversy "arises out of an entirely peaceful and orderly distribution of a written message, rather

² Petitioner asserts that "[s]ince the enactment of the Act's secondary boycott prohibitions in 1959, neutral employers have been protected from all secondary activity, regardless of whether such activity involved picketing, handbilling or other publicity", and that the decision below for the first time removes that assumed protection. Pet. 4-6. This argument fails because its premise is invalid: Although the 1959 amendments to § 8(b)(4) expanded the previously-existing prohibitions on secondary boycott activity by unions, those amendments did not outlaw all such activities, as *Labor Board v. Fruit Packers*, 377 U.S. 58 ("Tree Fruits"), and *Labor Board v. Servette, Inc.*, 377 U.S. 46 ("Servette") establish. Petitioner therefore simply begs the question of statutory interpretation presented here: whether secondary consumer handbills, such as in this case, are a form of secondary boycott forbidden in 1959.

than picketing," *DeBartolo I*, 463 U.S. at 157. That court noted the Union's contention "that such distribution of a written message is a form of speech protected by the First Amendment" (Pet. App. 4a), and, therefore, drew on the teachings of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501:

In *Catholic Bishop*, the Court stated that it would determine whether the statutory interpretation proposed by the NLRB "would give rise to serious constitutional questions." * * * If so, the Court held, that "the affirmative intention of the Congress clearly expressed," * * * must be identified, before the statute could be construed in such a manner." [Pet. App. 5a.]

This methodology was faithfully followed by the Court of Appeals.

With respect to the first inquiry prescribed by *Catholic Bishop*, the Eleventh Circuit concluded:

In light of the absence of the nonspeech elements which have permitted restrictions on labor picketing and in light of the full First Amendment protection afforded to handbilling and pamphleteering, we conclude that if § 8(b)(4)(ii)(B) is construed to prohibit certain types of handbilling, serious constitutional questions will arise. Therefore, we must examine the statute and its legislative history in order to identify "the affirmative intention of the Congress clearly expressed" to prohibit such speech. [Pet. App. 13a-14a, footnote omitted.]

Turning then to that examination, the Court of Appeals observed that while the "language of the statute contains no clear expression of an affirmative intent of Congress to prohibit the distribution of handbills urging a secondary boycott * * * the prohibition against threatening, coercing, or restraining could be read very broadly." (Pet. App. 15a.) That court therefore undertook a meticulous and thorough review of the legislative

history of the 1959 amendments to the NLRA which put § 8(b)(4)(ii)(B) in its present form to ascertain whether the proponents of that amendment stated such an affirmative intent to reach handbills. For this Court's convenience we outline the major points made by the court below concerning that history.

(a) The Labor Reform Bill ("Kennedy-Ervin") which passed the Senate in 1959 did not amend § 8(b)(4). The Administration Bill did propose, however, to amend the NLRA by making it an unfair labor practice for a union to threaten, coerce, or restrain a secondary; its Senate sponsors did not, in explaining the abuses that would be covered by that language, refer to *any* form of appeal to consumers as making the amendment necessary. Sen. McClellan proposed his own amendment, but he went no further than to claim that his proposal would outlaw *secondary consumer picketing* (though as this Court has held, not all such picketing, see *Tree Fruits*, 377 U.S. at 65-66). (Pet. App. 16a.)³

(b) In the House of Representatives, the Administration's proposal was contained in the Landrum-Griffin bill which was adopted by the House. Rep. Griffin's original statement introducing that bill did not make any reference to any form of appeal to consumers in the list of abuses which he stated required the secondary boycott amendments. (Pet. App. 20a-21a.) On August 6, 1959, however, President Eisenhower delivered an address on the need for effective labor reform wherein he called for restrictions on *secondary consumer picketing*. Shortly thereafter, during House debates, Rep. Griffin "did discuss consumer picketing, but only in the context of its abuse when directed against shutting off the patronage of a secondary employer." (*Id.* at 22a, quoting 377 U.S. at 67, Court of Appeals' emphasis.) He did so in the

³ As the Court of Appeals observed, its description of pertinent events in the Senate is in accord with this Court's description thereof in *Tree Fruits*, 377 U.S. at 65-67.

course of a colloquy with Rep. Brown of Ohio (reproduced at Pet. App. 22a-23a) from which the court below concluded that Rep. Griffin "clearly had in mind only prohibiting consumer picketing by his proposed amendments to § 8(b)(4)", and "that he recognized that his bill was limited by the constitutional right of free speech." (*Id.* at 23a-24a.)

(c) The only suggestions throughout the consideration of the secondary boycott amendments that § 8(b)(4) might reach appeals to consumers by means other than picketing came from *opponents* of any secondary boycott amendments. But the Court of Appeals recognized the teaching of *Tree Fruits*, with respect to the same statutory language, that "the fears and doubts of the opposition are no authoritative guide to the construction of legislation." (Pet. App. 25a, quoting 377 U.S. 66.)

(d) The resulting House-Senate Conference Committee Labor Reform Bill—whose provision concerning § 8(b)(4) was enacted into law—agreed to recommend the amendments to § 8(b)(4) in the Landrum-Griffin bill but, in response to the fears of the opponents of those amendments to § 8(b)(4), drafted the publicity proviso to § 8(b)(4), which was the subject of *DeBartolo I.* (Pet. App. 25a.) This proviso is set forth in the margin.⁴ The Court of Appeals observed that the language of the proviso that "was clearly drafted to cover nonpicketing labor

⁴ "Provided further, That for the purposes of this section (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution."

activity which had been discussed—*secondary union action taken against a retail store selling a struck manufacturer's product.*" (*Id.* 25a-26a, emphasis in original.) That court noted that this "paradigm" had been the focus of the discussion of consumer picketing by President Eisenhower, Sen. McClellan and Rep. Griffin; the opponents, who feared that the bill might reach nonpicketing labor publicity, also discuss publicity in terms of this "paradigm case". "However," the Court of Appeals concluded, "the fact that the publicity proviso was drafted in terms of the paradigm case, does not change the fact that at no time had a proponent of the amendments to § 8(b)(4) stated that nonpicketing should be or was being prohibited by the amendments." (*Id.* 26a.)

(e) The Board argued below, and petitioner contends here, that the publicity proviso's language evidences an intent to prohibit nonpicketing publicity which does not conform to its terms. But the court below *squarely* rejected that argument:

In a case of a true statutory exception what the Board argues would be true—an exception exists only to exempt something which would otherwise be covered. However, the legislative history makes it clear that not only did the supporters of the amendments to § 8(b)(4) intend only to prohibit consumer picketing, but also that the publicity proviso was inserted both to clarify their position that nonpicketing publicity was not prohibited and, most importantly, to allay the fears of the opponents of the amendments that such speech would be restricted. [Pet. App. 26a, emphasis in original.]

This understanding is clearly confirmed by the subsequent events leading to the passage of the 1959 Labor Reform Act.

(f) In the House, Rep. Griffin and, in the Senate, Sen. Goldwater entered in the Record a "Summary analysis of conference agreement as to Title VII, Taft-

Hartley Amendments"⁶ stating in relevant part that the agreement

Adopts House provision with clarification that other forms of publicity are not prohibited; also clarification that picketing at primary site is not secondary boycott. [Pet. App. 28a.]

(g) In Senate debate on the Conference Agreement, Sen. Kennedy and Sen. Goldwater engaged in a colloquy wherein Sen. Kennedy indicated "that he believed that the publicity proviso meant that 'the union shall be free to conduct informational activities short of picketing'".⁶ The Court of Appeals pointed out that Senator Goldwater, "a member of the conference committee and an ardent supporter of the amendments to § 8(b)(4)," stated:

The Senate bill did not deal with the subject of secondary boycotts. The House bill, however, closed up every loophole in the boycott section of the law including the use of a secondary picket line, an example of which the President gave on his nationwide TV program on August 6.⁷

(h) From its examination of the legislative history, the Court of Appeals concluded:

In summary, we can ascertain no affirmative intention of Congress clearly expressed to prohibit nonpicketing labor publicity. As pointed out in *Tree Fruits*, it was only in the later debates of the labor

⁶ This "analysis" is reproduced in full at Pet. App. 28a-29a. It appeared originally at 105 Cong. Rec. 17,181 (1959), reprinted in 2 Legislative History of the Labor Management Reporting and Disclosure Act of 1959 ("Leg. Hist.") 1454; 105 Cong. Rec. 16,539-40 (1959); reprinted in 2 Leg. Hist. 1712-13.

⁶ Pet. App. 33a, Cong. Rec. 16,413, reprinted in 2 Leg. Hist. 1432.

⁷ Pet. App. 36a, quoting 105 Cong. Rec. 16,419, reprinted in 2 Leg. Hist. 1437.

reform bill, after President Eisenhower had focused attention on consumer picketing of a retail distributor of a struck manufacturer, that both houses began to consider that the amendments should apply to consumer picketing. Nowhere, except in the statements of the opposition, is there any suggestion that the amendments to § 8(b)(4) would prohibit nonpicketing labor publicity. Pet. App. 37a.

Accordingly, the Court concluded that Congress did not intend to outlaw peaceful secondary handbilling addressed to consumers.

2. There Is No Conflict Between The Circuits. Petitioner asserts that there is a "conflict" between the decision below and *Boxhorn's [Big Moskego Gun Club v. Electrical Workers]*, 798 F.2d 1016 (C.A. 7, 1986).⁸ (Pet. 9.) The Seventh Circuit, however, after issuing an original opinion that, standing alone, would have supported that assertion, then took pains to disavow the existence of any conflict. In an opinion denying petitions for rehearing, that court clearly delineated the limits of its holding:

... [T]his case does not require us to decide how pure handbilling should be treated. The Union in *Florida Gulf Coast* did nothing except hand out literature. The defendants in this case engaged in picketing and blocked the entrance to the Club, forcing drivers to stop and observe the handbill. Almost all drivers took the proffered handbill. Patrons in a shopping mall feel free to pass by a handbiller, and most do. *It is enough in this case to say that handbilling that is part of a course of conduct that includes picketing and blocking the approach of patrons is prohibited by § 8(b)(4) unless exempted by the publicity proviso. No broader holding is necessary to decide this case, and the language in our original opinion should be read against this caveat.* [798 F.2d at 1024, emphasis added.]

The Seventh Circuit thus made clear that the legality of "pure handbilling" such as that in the present case remains an open issue in that court. The substantiality of the distinction between "pure handbilling" and "handbilling as part of a course of conduct that includes picketing and blocking the approach of patrons" cannot be disputed. As we have shown, Congress made clear its intent to curb secondary consumer picketing, as distinct from other forms of communication, and this Court's First Amendment decisions have consistently differentiated between picketing—which has been held to be entitled to only limited constitutional protection—and other forms of communication, such as handbills, which have been held to a full measure of protection. There is, therefore, no inconsistency in results which needs to be resolved by this Court in order to achieve uniformity in the application of a federal statute.⁹

The Seventh Circuit's opinion denying rehearing does not, to be sure, accept the Eleventh Circuit's approach; indeed, the Seventh Circuit expressed doubts concerning aspects of the Eleventh Circuit's reasoning in this case. But it is well-settled that such disagreements do not amount to an intercircuit conflict. It is a familiar principle that "this Court reviews judgments, not opinions." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842; see also, e.g., *Black v. Cutter Laboratories*, 351 U.S. 292, 297.⁹

⁸ *Soft Drink Workers Union, Local 812 v. N.L.R.B.*, 657 F.2d 1252 (C.A.D.C.), 1255-56, 1260-68 and *Hoffman v. Cement Masons Union Local 337*, 468 F.2d 1187 (C.A. 9), cited at Pet. 5, n.2, like *Boxhorn's*, involved handbilling which was intertwined with picketing; both cases were treated as "picketing" cases by those courts. Neither of the other courts of appeals cases cited in that footnote involved handbilling or any other union efforts directed at consumers.

⁹ In asserting that the Seventh Circuit "did not disavow or even modify those portions of its prior opinion which clearly conflicted

In sum, there is no conflict of decisions between the Eleventh Circuit and any other Court of Appeals.

Respectfully submitted,

MARK F. KELLY
401 South Albany
Tampa, Florida 33606

LAURENCE J. COHEN
1125 15th Street, N.W.
Washington, D.C. 20005

Of Counsel:

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
Counsel of Record

with the decision below" (Pet. 8), petitioner disregards that court's closing admonition: "No broader holding is necessary to decide this case, and language in our original opinion should be read against this caveat." (798 F.2d at 1024, emphasis added.)

AMICUS CURIAE

BRIEF

3
No. 86-1461



In the Supreme Court of the United States

OCTOBER TERM, 1986

THE EDWARD J. DEBARTOLO CORPORATION,
Petitioner,

vs.

FLORIDA GULF COAST BUILDING AND
CONSTRUCTION TRADES COUNCIL,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

ON THE PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

~~MOTION~~ OF THE AMERICAN RETAIL FEDERATION
FOR LEAVE TO FILE AMICUS CURIAE
BRIEF SUPPORTING PETITION FOR WRIT
OF CERTIORARI
AND
BRIEF OF AMICUS CURIAE, AMERICAN RETAIL
FEDERATION, SUPPORTING PETITION FOR
WRIT OF CERTIORARI

JACK L. WHITACRE

(Counsel of Record)

SPENCER, FANE, BRITT & BROWNE

1400 Commerce Bank Building

1000 Walnut

Kansas City, Missouri 64106

(816) 474-8100

*Attorneys for Amicus Curiae,
American Retail Federation*

TABLE OF CONTENTS

Table Of Authorities	1
Motion For Leave To File Brief	1
Brief Of Amicus Curiae	5
Interest Of Amicus Curiae	5
Reasons For Granting The Writ	5

TABLE OF AUTHORITIES

Cases

<i>American Federation of Television Radio Artists (Great Western Broadcasting Corp.)</i> , 134 NLRB 1617 (1961), rev'd, 310 F.2d 591 (9th Cir. 1962), supp. dec., 150 NLRB 467 (1964), aff'd, 356 F.2d 434 (9th Cir. 1966), cert. denied, 384 U.S. 1002 (1966)	6
<i>Boxhorn's Big Muskego Gun Club, Inc. v. Elec. Workers Local 497</i> , 798 F.2d 1016 (7th Cir. 1986)	9, 10
<i>Edward J. DeBartolo Corp. v. N.L.R.B.</i> , 463 U.S. 147 (1983)	6, 7, 8, 9
<i>Edward J. DeBartolo Corp. v. N.L.R.B.</i> , 662 F.2d 264 (4th Cir. 1981)	7
<i>Florida Gulf Coast Building Trades Council, AFL-CIO (Edward J. DeBartolo Corp.)</i> , 252 NLRB 702 (1980)	7
<i>Florida Gulf Coast Building Trades Council, AFL-CIO (Edward J. DeBartolo Corp.)</i> , 273 NLRB 1431 (1985)	8
<i>Florida Gulf Coast Building Trades Council v. N.L.R.B.</i> , 796 F.2d 1328 (11th Cir. 1986)	8
<i>International Brotherhood of Teamsters, Local No. 537 (Lohman Sales Co.)</i> , 132 NLRB 901 (1961)	7
<i>Local No. 662, Radio and Television Engineers (Middle South Broadcasting Co.)</i> , 133 NLRB 1698, 1705 (1961)	7
<i>NLRB v. Retail Store Employees Union, Local 1001 (Safeco)</i> , 447 U.S. 607	9
<i>NLRB v. Servette, Inc.</i> , 377 U.S. 46 (1964)	6
<i>Solein v. Carpenters District Council</i> , 623 F. Supp. 597 (E.D. Mo. 1985)	10
<i>United Steelworkers of America, AFL-CIO (Pet, Incorporated)</i> , 244 NLRB 96 (1979), rev'd, sub nom., <i>Pet, Inc. v. NLRB</i> , 641 F.2d 545 (8th Cir. 1981)	6-7

<i>Wholesale Delivery Drivers Local No. 848 (Servette, Inc.)</i> , 133 NLRB 1501 (1961), rev'd, sub nom., <i>Servette, Inc. v. NLRB</i> , 310 F.2d 659, cert. granted and rem'd, <i>NLRB v. Servette, supra</i>	6
---	---

Statutes

29 U.S.C. § 160(1)	10
29 U.S.C. § 187	10
Labor-Management Reporting and Disclosure Act of 1959, PUB. L. 86-257, 73 STAT. 519	6
National Labor Relations Act, Section 8(b)(4), 29 U.S.C. § 158(b)(4)	5-6, 9

No. 86-1461

In the Supreme Court of the United States

OCTOBER TERM, 1986

THE EDWARD J. DEBARTOLO CORPORATION,
Petitioner,

vs.

FLORIDA GULF COAST BUILDING AND
CONSTRUCTION TRADES COUNCIL,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

ON THE PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

**MOTION OF THE AMERICAN RETAIL FEDERATION
FOR LEAVE TO FILE AMICUS CURIAE
BRIEF SUPPORTING PETITION FOR WRIT
OF CERTIORARI**

The American Retail Federation ("Federation") respectfully moves the Court for leave to file a brief amicus curiae supporting the petition by the Edward J. DeBartolo Corporation for a writ of certiorari.

The Federation is made up of twenty-seven national associations and fifty state associations of retailers, representing through these associations one million retail establishments. These retailers range from large, multi-unit enterprises to corner markets and small variety stores and

employ nearly sixteen million people. Thus, the Federation is in a unique position to express the interests of this very important segment of the national economy.

The Federation regularly represents the interests of its member-employers in important labor relations matters. It concerns itself with national issues and problems affecting retailers and has sought to advance the interests of its member-employers by participating in a wide range of labor relations litigation before this Court and other courts and in testimony before Congress involving labor legislation.

The specific issue presented in this case is whether, despite the producer-distributor requirement in the "publicity proviso" to the secondary boycott prohibitions, Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4), a union may handbill urging a consumer boycott of all the neutral tenants of a shopping center and the neutral owner of the center (DeBartolo) simply because the union has a labor dispute with the construction contractor (High Construction) engaged by one of the center's tenants (H. J. Wilson).

Many of the Federation's member-employers are shopping center tenants. By and large they are independent, autonomous enterprises. The decision by the Court of Appeals in this case permits coercive secondary activity against neutral retailers simply because another tenant may be involved with a construction contractor who has a labor dispute. As a result, these neutral retailers will be enmeshed in labor disputes over which they have absolutely no control or influence. Furthermore, the decision of the court below will no doubt be read to permit secondary boycott activity against innocent, uninvolved retailers in other contexts. The impact of the decision will

be felt by countless retailers and thus this case warrants the participation of the Federation on behalf of its members.

The Federation has secured the written consent of each other party to this proceeding to its filing of a brief *amicus curiae* in support of the petition for certiorari filed by the Edward J. DeBartolo Corporation.

For these reasons, it is respectfully requested that the Federation be given leave to file the following brief as *amicus curiae*.

Respectfully submitted,

JACK L. WHITACRE

(Counsel of Record)

SPENCER, FANE, BRITT & BROWNE

1400 Commerce Bank Building

1000 Walnut

Kansas City, Missouri 64106

(816) 474-8100

*Attorneys for Amicus Curiae,
American Retail Federation*

No. 86-1461

In the Supreme Court of the United States

OCTOBER TERM, 1986

THE EDWARD J. DeBARTOLO CORPORATION,
Petitioner,

vs.

FLORIDA GULF COAST BUILDING AND
CONSTRUCTION TRADES COUNCIL,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

ON THE PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

**BRIEF OF AMICUS CURIAE, AMERICAN RETAIL
FEDERATION, SUPPORTING PETITION FOR
WRIT OF CERTIORARI**

INTEREST OF AMICUS CURIAE

The interest of the amicus curiae is set forth in the
Motion preceding this brief and incorporated herein.

REASONS FOR GRANTING THE WRIT

In 1959, when Congress expanded the secondary boycott prohibitions, by amending the National Labor Re-

lations Act, 29 U.S.C. § 158(b)(4),¹ it adopted the "publicity proviso" at issue here. *Edward J. DeBartolo Corp. v. N.L.R.B.*, 463 U.S. 147, 153-156 (1983) ("DeBartolo I"). The proviso protects truthful publicity that advises the public "that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer so long as such publicity does not have an effect of inducing" a strike by employees of any person other than the primary employer. 29 U.S.C. § 158(b)(4).

For over 25 years after this legislation broadening the prohibition on secondary boycotts and adopting this proviso, the National Labor Relations Board ("the Board") and the courts were concerned with determining whether handbilling fell within the conduct prohibited by the Act or was protected by the proviso, which was construed as an "exception" to the secondary boycott proscriptions. *NLRB v. Servette, Inc.*, 377 U.S. 46, 55 (1964). The focus of this judicial attention was whether the "product" boycott or "consumer" boycott was "coercive" and whether the required producer/distributor relationship (the "distribution requirement") existed between the primary and secondary employers.²

1. Labor-Management Reporting and Disclosure Act of 1959, PUB. L. 86-257, 73 STAT. 519.

2. See, e.g., *Wholesale Delivery Drivers Local No. 848 (Servette, Inc.)*, 133 NLRB 1501 (1961), rev'd, sub nom., *Servette, Inc. v. NLRB*, 310 F.2d 659, cert. granted and rem'd, *NLRB v. Servette, supra* (construing the phrase "produced by an employer"); *American Federation of Television Radio Artists (Great Western Broadcasting Corp.)*, 134 NLRB 1617 (1961), rev'd, 310 F.2d 591 (9th Cir. 1962), supp. dec., 150 NLRB 467, 470-472 (1964), aff'd, 356 F.2d 434 (9th Cir. 1966), cert. denied, 384 U.S. 1002 (1966) (whether advocating a total boycott rather than a single product boycott of the secondary employer was "coercive"); *United Steelworkers of America, AFL-CIO (Pet,*

(Continued on following page)

Focus on the required producer/distributor relationship continued when this case was first before the Board. *Florida Gulf Coast Building Trades Council, AFL-CIO (Edward J. DeBartolo Corp.)*, 252 NLRB 702 (1980). When the Council, through handbilling, urged a boycott of all the tenants in the DeBartolo shopping center because of its dispute with Wilson's contractor High, the Board concluded that there was a "sympiotic" relationship which came within the "producer/distributor" requirement. The Board reasoned DeBartolo, the shopping center owner, and all of its tenants, including Wilson, the primary employer, "... would derive a substantial benefit from the 'product' that High was constructing, namely Wilson's new store." *DeBartolo I*, 463 U.S. at 152; 252 NLRB at 705.

The Fourth Circuit agreed with the Board, 662 F.2d 264 (4th Cir. 1981), placing it in conflict with the *Pet, Inc.*, *supra* decision of the Eighth Circuit. This Court granted review to resolve the conflicts between the circuits. 463 U.S. at 153. The issue before this Court in *DeBartolo I* was the proper construction of the proviso not its coverage:

Indeed, we may assume here that the proviso's "coverage"—the types of primary disputes it allows to be publicized—is broad enough to include almost any primary dispute that might result in prohibited secondary activity.

Footnote continued—

Incorporated), 244 NLRB 96 (1979), rev'd, sub nom., *Pet, Inc. v. NLRB*, 641 F.2d 545 (8th Cir. 1981) (whether a subsidiary corporation was a "producer" of the parent corporation's products); *International Brotherhood of Teamsters, Local No. 537 (Lohman Sales Co.)*, 132 NLRB 901 (1961) (whether a "wholesaler" was a "producer"); *Local No. 662, Radio and Television Engineers (Middle South Broadcasting Co.)*, 133 NLRB 1698, 1705 (1961) (whether a television station was a "producer").

463 U.S. at 155. However, this Court rejected "... the Board's interpretation of the extent of the secondary activity that the proviso permits" and held:

The only publicity exempted from the prohibition is publicity intended to inform the public that the primary employer's product is "distributed by" the secondary employer. . . . [I]f Congress had intended all peaceful, truthful handbilling that informs the public of a primary dispute to fall within the proviso, the statute would not have contained a distribution requirement.

463 U.S. at 155-56. This was so even though the Court was aware of, even concerned about, the First Amendment arguments. 463 U.S. at 157.³

This Court then remanded the case for a determination of whether the conduct was proscribed by the Act. The Board so found. 273 NLRB 1431 (1985) (Appendix A, pp. 38A-46A to Petitioner's Brief).

On appeal, the Eleventh Circuit Court of Appeals, 796 F.2d 1328 (Appendix A, pp. 1A-37A to Petitioner's Brief), avoided the constitutional issue and, surprisingly, concluded that the proviso protects all handbilling without regard to the scope of the boycott or the existence of the heretofore required producer/distributor relationship. The court concluded there was no suggestion in the legislative history of the 1959 amendments that the amendments were intended to "... prohibit non-picketing labor publicity."

The Eleventh Circuit's decision is an abrupt departure from the long line of Board and court decisions which

3. "Nevertheless, we do not reach the constitutional issue in this case. For, as we noted at the outset, the Board has not yet decided whether the handbilling in this case was proscribed by the Act." 463 U.S. at 157-58.

have uniformly held that section 8(b)(4) of the Act encompassed certain "coercive" handbilling boycotts. Over twenty-five years of judicial attention on the "limiting effect" of the proviso was held to be irrelevant. More importantly, the decision below cannot be squared with this Court's construction of the proviso in *DeBartolo I*.

This is not to say that legitimate First Amendment concerns do not arise here. However, secondary boycotts may be restricted as part of "... Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees and consumers to remain free from coerced participation in industrial strife." *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. 607, 617-18 (Blackman, J., concurring in part). While the First Amendment may well be "the basis of a narrow construction of section 8(b)(4)," it does not follow "that constitutional overtones can be employed to narrow the statute's scope to picketing and nothing but, as the Eleventh Circuit has done." *Boxhorn's Big Muskego Gun Club, Inc. v. Elec. Workers Local 497*, 798 F.2d 1016, 1024 (7th Cir. 1986). Indeed, as both *DeBartolo I* and *Boxhorn's* recognized, to limit the "coercive" secondary boycott provisions to picketing and to permit all other forms of secondary activity irrespective of the relationship of the primary and secondary employers is to deprive the proviso "of its limiting effect." *DeBartolo I*, 463 U.S. at 156.⁴

Resolution of the conflict concerning the proviso and the impact of constitutional overtones is required. Not

4. "Often Congress wants to press right to the limit of its constitutional power, and surveying those limits is what courts are for. [citations omitted]. Courts may not trim back statutes to keep them out of a danger zone; Congress can have as much danger as it desires. [citations omitted]." *Boxhorn's*, supra, 798 F.2d at 1021.

only should the Board and the Circuit Courts of Appeal have the benefit of this resolution, but the federal district courts often must address such issues at an early stage when deciding section 303 secondary boycott damage actions⁵ and section 10(1) preliminary injunction actions.⁶ Given the increased use of the handbilling boycott weapon in economic warfare and the sweeping ramifications of the restructuring of the secondary boycott prohibitions by the Eleventh Circuit, petitioner's writ must be granted.

Respectfully submitted,

JACK L. WHITACRE

(Counsel of Record)

SPENCER, FANE, BRITT & BROWNE

1400 Commerce Bank Building

1000 Walnut

Kansas City, Missouri 64106

(816) 474-8100

Attorneys for Amicus Curiae,

American Retail Federation

5. 29 U.S.C. § 187 provides for the recovery of money damages as a result of "any activity or conduct defined as an unfair labor practice in section 158(b)(4). . . ." *E.g., Boxhorn's, supra.*

6. 29 U.S.C. § 160(1) requires the Board, if it has reasonable cause to believe a violation of section 8(b)(4)(A), (B) or (C) is occurring, to seek appropriate injunctive relief pending the final adjudication by the Board. *See, e.g., Solein v. Carpenters District Council*, 623 F. Supp. 597 (E.D. Mo. 1985).

AMICUS CURIAE

BRIEF

(5)
No. 86-1461

Supreme Court, U.S.
FILED

MAY 13 1987

JOSEPH F. SPANIOLO, JR.
CLERK

In the
Supreme Court of the United States

OCTOBER TERM 1986

THE EDWARD J. DEBARTOLO CORP.,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

FLORIDA GULF COAST BUILDING TRADES COUNCIL, AFL-CIO,
Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

**Brief Amicus Curiae of the International Council
of Shopping Centers, Inc., in Support of Petitioner**

EDWARD J. SACK
STEPHANIE McEVILY
INTERNATIONAL COUNCIL OF
SHOPPING CENTERS
665 Fifth Avenue
New York, NY 10022
(212) 421-8181

8 p/2

TABLE OF CONTENTS

Interest of the <i>Amicus Curiae</i>	1
Reasons for Granting the Writ	2
Conclusion	6

TABLE OF AUTHORITIES

Cases:

<i>Boxhorn's Big Muskego Gun Club, Inc. v. Electrical Workers Local 494</i> , 798 F.2d 1016 (7th Cir. 1986) ..	5
<i>Cologne v. Westfarms Associates</i> , 469 A.2d 1201 (Conn. 1984)	4

Statutes:

National Labor Relations Act, 29 U.S.C. §158(b)(4) (ii)(b)	4
--	---

Miscellaneous:

105 Cong. Rec. 597 (1959), reprinted in 2 Leg. Hist. at 1198	3
Flynn, <i>Carpenter's Shopping Center Management</i> , ICSC (1984)	5
ICSC <i>Membership Directory 1986-1987</i> (ICSC 1986) ..	5
ICSC Research Department, <i>Sales Estimate 1986 Retail Sales</i>	5
<i>Shopping Center Development Handbook</i> , The Urban Land Institute (2nd ed. 1985)	3
<i>1987 Shopping Center Directory</i> , The National Research Bureau (1987)	2, 3
<i>Shopping Center World</i> , January 1987, p. 34	5
Zimmerman, <i>The Changing Arsenal of Economic Weapons: Consequences for Section 8(b)(4), The Board and the Courts</i> (remarks before 1981 New York University National Conference on Labor), reprinted at 117 Daily Lab. Rep. D-1 (June 18, 1981)	4

In the
Supreme Court of the United States

OCTOBER TERM 1986

THE EDWARD J. DEBARTOLO CORP.,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

FLORIDA GULF COAST BUILDING TRADES COUNCIL, AFL-CIO,
Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

**Brief Amicus Curiae of the International Council of
Shopping Centers, Inc., in Support of Petitioner***

Interest of the Amicus Curiae

The International Council of Shopping Centers, Inc. ("ICSC"), is the trade association of the shopping center industry. Members of the ICSC, consisting of shopping center developers, retailers, investors, managers and all others having a professional or business interest in the shopping center industry, are engaged in the day-to-day activities of designing, planning, constructing, managing, financing, developing, leasing and owning shopping centers and their retail stores. ICSC has approximately 19,500 members, and the approximately 17,000 located in the

* This brief is submitted with the written consent of counsel to the three parties filed with the Clerk of the Court. The consent letters are being filed concurrently herewith.

United States represent a majority of the shopping centers in this country. The ICSC is the only U.S. trade association specific to shopping centers.

ICSC's members have a clear interest in the disposition of the present case. The holding of the court below would permit unions to handbill or urge a secondary boycott of all tenants in a shopping center in the event of a dispute between a labor union and a contractor doing business with an individual tenant. Because this affects the legal rights of every shopping center in the United States, the ICSC requests that the Court recognize the importance of this case to the business operations of the shopping center industry. ICSC respectfully submits this brief to bring to the Court's attention the urgency for a resolution of the issues presented by this case in the context of the shopping center industry.

Reference is made to the brief of the petitioner for a statement of the facts of this case and the applicable statutes. This brief will be confined to the aspects of the case specifically related to shopping centers.

Reasons for Granting the Writ

A. If the decision of the court below is permitted to stand, a vital protection guaranteed to neutral employers since the enactment of the National Labor Relations Act (the Act) will be revoked in the Eleventh Circuit and will be jeopardized in circuits in which a decision has not been rendered. As long as a union does not picket, it may involve neutral employers in labor disputes in which neutrals were formerly protected. In the context of a shopping center, the threat of disruption is multiplied. The number of tenants in a center may vary from about nine stores in a 50,000 square foot neighborhood center¹ to as many as 144 stores in a 1,500,000 square foot super-

¹ Chestnut Run Shopping Center, Wilmington, Delaware, 1987 *Shopping Center Directory*, p. 5-50, The National Research Bureau, 1987.

-regional center.² Since the number of suppliers and manufacturers grows in proportion to the number of tenants, the threat of potential disturbance to the daily business of a shopping center is staggering.

For example, another source states that a super-regional mall, with an average of 800,000 square feet, has at least three full-line department stores³ and may have as many as 179 tenants.⁴ These tenants, even excluding the department stores, include a wide range of retailers, such as shoe stores, ladies' apparel, men's apparel and gift shops. In addition there are many services offered, *e.g.*, fast food, banks and hair cutting establishments.⁵ If a shoe or garment manufacturer whose product is sold by one of the tenants is involved in a labor dispute, under the Eleventh Circuit's decision a union may post members at each entrance to the mall. These individuals may handbill at each mall entrance urging potential customers not to enter the mall. The gift shops, the bank, the hair salons would all lose customers because of a labor dispute involving a single tenant. Whether the form of coercion involves picketing or handbilling, the intended effect is the same: consumers will feel constrained not to shop in a place which is involved in a labor dispute. This is a method of "dissuading customers from dealing with secondary employers . . . a form of coercion against an innocent employer, in an effort to compel the employer who has a strike on his hands to come to terms with the union. It is an effort to influence the original employer."⁶ Though it is not picketing, it is indeed a form of secondary boycott, an effort within the meaning of Section 8(b)(4)(ii)(b) of the Act to "coerce or restrain any person engaged in commerce . . . to cease doing business with any other person."⁷

² Tysons Corner Center, McLean, Virginia, *id.* at 5-555.

³ *Shopping Center Development Handbook*, The Urban Land Institute (2d ed. 1985), p. 6.

⁴ 1987 *Shopping Center Directory*, *supra*, n. 1 at 5-305.

⁵ *Id.* at 5-306.

⁶ 105 Cong. Rec. 597 (1959), reprinted in 2 Leg. Hist. at 1198.

⁷ 29 U.S.C. Sec. 158(b)(4)(ii)(b).

Furthermore, with so many retailers concentrated in a single location, it is not inconceivable that more than one manufacturer or supplier would be involved in a labor dispute simultaneously. If that were the case, there could be several members from each labor union stationed at each of the many mall entrances. The coercive effect of such handbilling would be compounded. Innocent tenants, with no connection to the underlying labor dispute, whether they are a large department store or the local ice cream parlor, would face drastic curtailment of their businesses.

The disruptive effect of such handbilling would be additionally compounded if anti-union demonstrators arrived and engaged in disruptive conduct. In 1984, for example, at a mall in Connecticut, the Ku Klux Klan attempted a peaceful demonstration.⁸ Shortly after their departure, anti-Klan demonstrators arrived and clashed with the police. Police from surrounding areas, as well as state police, were summoned to bring the situation under control and some of the stores in the mall were forced to close for part of the day, causing them to lose sales revenue.⁹ A similar incident could occur where a union was peacefully distributing its handbills. Now that unions are turning more and more to the public to solicit support,¹⁰ the potential disruption caused by permitting unions to urge boycotts of neutral employers through handbills is augmented.

⁸ *Cologne v. Westfarms Associates*, 469 A.2d 1201 (Conn. 1984).

⁹ *Id.* at 1205. The lower court relied on this disturbance to modify an injunction permitting the exercise of free speech only in specified locations at the mall. The Connecticut Supreme Court held that the state constitution did not mandate public access to shopping centers.

¹⁰ See, Zimmerman, *The Changing Arsenal of Economic Weapons: Consequences for Section 8(b)(4), The Board and the Courts* (remarks before the 1981 New York University National Conference on Labor), reprinted at 117 Daily Lab. Rep. D-1 (June 18, 1981).

B. There are now an estimated 28,500 shopping centers throughout the United States.¹¹ The number of centers in each state ranges from 3,325 centers in California¹² to 32 in South Dakota.¹³ The total leasable retail area in these 28,500 centers is approximately 3.7 billion square feet and the amount of retail sales generated is \$554 billion.¹⁴ Shopping Centers employ approximately 6.9 million people, seven percent of the total non-agricultural employment in the United States.¹⁵

Management of these centers is no easy job. The complexity varies with the size of the center.¹⁶ Ownership also varies. Smaller centers may be owned by individuals who own one or two centers or they may be owned by national developers or institutions.¹⁷ Likewise, regional malls may be owned by developers who own malls in many states.¹⁸ The conflict between the Eleventh Circuit's decision in the instant case and the Seventh Circuit's decision in *Boxhorn's Big Muskego Gun Club*,¹⁹ as well as with previous Board and Court decisions, as discussed by petitioners²⁰ further complicates management of these businesses. If the decision below is allowed to stand, a developer who owns a center

¹¹ *Shopping Center World*, National Research Bureau Census, January 1987, p. 34.

¹² *Id.* at 42.

¹³ *Id.* at 53.

¹⁴ ICSC Research Department, Sales Estimate 1986 Retail Sales.

¹⁵ ICSC Research Department, *Update of 1982 Census of Retail Trade*, U.S. Bureau of Census.

¹⁶ *Carpenter's Shopping Center Management*, ed. Robert Flynn, p. 103, ICSC (1984).

¹⁷ *See, 1986-1987 Membership Directory* (ICSC, New York 1986).

¹⁸ *Id.*

¹⁹ *Boxhorn's Big Muskego Gun Club, Inc. v. Electrical Workers Local 494*, 798 F.2d 1016 (7th Cir. 1986).

²⁰ Petition for Writ of Certiorari at 9.

in Florida, one in Connecticut, and one in Illinois would be subject to different rules if a manufacturer selling to a retailer located in both malls were involved in a labor dispute. The union in Florida would be permitted to distribute handbills at each mall entrance; the union in Illinois would not be able to; and the union in Connecticut would not be certain of its rights. For these reasons, the Court should decide whether, as the court below held, non-picketing activity falls outside the Act's secondary boycott prohibitions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD J. SACK
STEPHANIE McEVILY
INTERNATIONAL COUNCIL OF
SHOPPING CENTERS
665 Fifth Avenue
New York, NY 10022
(212) 421-8181

AMICUS CURIAE

BRIEF

MAY 13 1987

(6)
No. 86-1461

JOSEPH S. SPANIOLO, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1986

— o —
THE EDWARD J. DEBARTOLO CORP.,
Petitioner,
v.

FLORIDA GULF COAST BUILDING AND
CONSTRUCTION TRADES COUNCIL,
and
NATIONAL LABOR RELATIONS BOARD,
Respondents.

— o —
**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

— o —
**BRIEF AMICUS CURIAE ON BEHALF OF THE
CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

— o —
STEPHEN A. BOKAT
NATIONAL CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Attorney for Amicus Curiae

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of the <i>Amicus Curiae</i>	1
Reasons for Granting the Writ of Certiorari	3
Conclusion	9

TABLE OF AUTHORITIES

CASES	Page
<i>Abourezk v. Reagan</i> , 785 F.2d 1043 (D.C. Cir.), cert. denied, 107 S. Ct. 666 (1986)	6
<i>Amalgamated Food Employees Union, Local 590</i> <i>v. Logan Valley Plaza, Inc.</i> , 391 U.S. 308 (1968)	8
<i>Boxhorn's Big Muskego Gun Club, Inc. v. Electrical Workers Local 494</i> , 798 F.2d 1016 (7th Cir. 1986)	4, 8
<i>Chicago Typographical Union No. 16 (Alden Press, Inc.)</i> , 151 NLRB 1666 (1965)	5
<i>Edward J. DeBartolo Corp. v. NLRB</i> , 463 U.S. 147 (1983)	2
<i>Florida Gulf Coast Building and Construction Trades Council v. NLRB</i> , 796 F.2d 1328, reh'g denied, 806 F.2d 1070 (11th Cir. 1986)	2
<i>Hirschey v. FERC</i> , 777 F.2d 1 (D.C. Cir. 1985)	6
<i>International Longshoremen's Assn. v. Allied International, Inc.</i> , 456 U.S. 212 (1982)	5
<i>Miami Newspaper Pressmen's Local No. 46 v. NLRB</i> , 322 F.2d 405 (D.C. Cir. 1963)	7
<i>NLRB v. Denver Building & Construction Trades Council</i> , 341 U.S. 675 (1951)	7
<i>NLRB v. Fruits and Vegetable Packers and Warehousemen, Local 703 ("Tree Fruits")</i> , 377 U.S. 58 (1964)	4, 5
<i>NLRB v. Retail Store Employees Union, Local 1001 (Safeco Title Insurance Co.)</i> , 447 U.S. 607 (1980)	4, 5
<i>United States v. American College of Physicians</i> , 106 S. Ct. 1591 (1986)	6
STATUTES	
29 U.S.C. § 158(b)(4)(ii)(B)	passim

—o—
In The
Supreme Court of the United States

October Term, 1986
—o—

THE EDWARD J. DEBARTOLO CORP.,
Petitioner,
v.

FLORIDA GULF COAST BUILDING AND
CONSTRUCTION TRADES COUNCIL,
and
NATIONAL LABOR RELATIONS BOARD,
Respondents.

—o—
**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**
—o—

**BRIEF AMICUS CURIAE ON BEHALF OF THE
CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**
—o—

INTEREST OF THE AMICUS CURIAE¹

The Chamber of Commerce of the United States of America (the "Chamber") is a federation consisting of

¹ This brief is being filed with the written consent of all parties. Pursuant to Supreme Court Rule 36(1), these consents are being filed concurrently herewith.

more than 180,000 corporations, partnerships, and proprietorships, as well as several thousand trade associations and state and local chambers of commerce. It is the largest association of business and professional organizations in the United States.

A significant aspect of the Chamber's functions involves its representation of its member-employers in important labor relations matters. The Chamber has advanced those interests in a wide spectrum of labor relations litigation before this and other courts. The Chamber appeared as an *amicus curiae* both before this Court in *Edward J. DeBartolo Corp. v. NRLB*, 463 U.S. 147 (1983) ("*DeBartolo I*"), and in the proceedings before the court below, *Florida Gulf Coast Building and Construction Trades Council v. NLRB*, 796 F.2d 1328, *reh'g denied*, 806 F.2d 1070 (11th Cir. 1986).

The issues presented in this case are matters of substantial importance to the Chamber's members. Those questions are whether union handbilling advocating a total consumer boycott of neutral secondary employers constitutes "threats, restraint or coercion" within the prohibition of Section 8(b)(4)(ii)(B) of the National Labor Relations Act (the "Act"), 29 U.S.C. § 158(b)(4)(ii)(B),²

² Section 8(b)(4)(ii)(B), in pertinent part, provides:

It shall be an unfair labor practice for a labor organization or its agents . . . to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . . forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person

and, if so, whether that prohibition violates the First Amendment.

The answer to those questions will necessarily exert a significant impact on the rights of many Chamber members and their manner of doing business. Since the enactment of the Act's secondary boycott prohibition in 1959, neutral employers have been protected from coercive secondary activity, regardless of whether such activity involved picketing, handbilling, or other conduct. Coercion has heretofore been consistently defined to include all activity, regardless of its form, designed to inflict economic injury on secondary enterprises. The interpretation adopted by the court below would now remove that protection. A labor organization would be permitted to enmesh neutral employers in a multitude of wholly unrelated labor disputes simply by utilizing conduct other than picketing. For these reasons, the Chamber respectfully requests the Court to consider its views.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. For almost three decades, both the National Labor Relations Board (the "Board") and the courts have consistently concluded that, where, as here, the publicity proviso exception to Section 8(b)(4) is inapplicable, unions may not seek a total consumer boycott of a neutral secondary employer.³ The method of imposing that boycott,

³ See, e.g., the cases cited by the Board in its supplemental decision, Pet. Appendix A, pp. 41a-42a.

whether by picketing, handbilling or other publicity, has heretofore been immaterial. The statutory prohibition does not turn on the particular form of the misconduct; “the prohibition of § 8(b)(4) . . . [is] keyed to the coercive nature of the conduct, whether it be picketing or otherwise.” *NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 703 (“Tree Fruits”)*, 377 U.S. 58, 68 (1964). As this Court recognized in *DeBartolo I*, if Congress had intended that the Act cover only picketing, there would have been no need to insert a detailed proviso in Section 8(b)(4), which exempts some but not all nonpicketing publicity. 463 U.S. at 156.

Nevertheless, the decision below simply treats the “publicity proviso as so much blather.” *Boxhorn’s Big Muskego Gun Club, Inc. v. Electrical Workers Local 494*, 798 F.2d 1016, 1024 (7th Cir. 1986). Notwithstanding the admonition of *DeBartolo I* that “the *only* publicity exempted from [Section 8(b)(4)’s] prohibition” is that covered by the publicity proviso (463 U.S. at 155; emphasis added), the Eleventh Circuit concluded that the Act does not prohibit nonpicketing publicity even where that publicity is not “closely confined to the primary dispute” (*Tree Fruits*, 377 U.S. at 72) and not protected by the publicity proviso.

The Court of Appeals has disregarded the objective of Section 8(b)(4): “to prevent neutrals from becoming innocent victims in contests between others.” *NLRB v. Retail Store Employees Union, Local 1001 (Safeco Title Insurance Co.)*, 447 U.S. 607, 614 n. 8 (1980). Because the effect of “understandable and even commendable” secondary boycott actions is “to impose a heavy burden on neutral employers. . . . [I]t is just such a burden, as well as

the widening of industrial strife, that the secondary boycott provisions were designed to prevent.” *International Longshoremen’s Assn. v. Allied International, Inc.*, 456 U.S. 212, 223 (1982).

The Act’s secondary boycott prohibitions represent a carefully wrought compromise. Unions have been left free to exert economic pressure against primary employers. Non-coercive activities which do not urge a boycott of the secondary employer, but only announce to the public the existence of a labor dispute, are also outside the Act’s proscription.⁴ Indeed, Congress even specifically allowed some coercive secondary activity: picketing directed at a struck product under the criteria of *Tree Fruits* and *Safeco* or other publicity which, as provided for in the proviso, does not involve either picketing, the use of falsehoods, the effect of cutting off deliveries or inducing a secondary employer to cease work, or a secondary employer who does not have a producer-distributor relationship with the primary disputant. Unions were concurrently prohibited, however, from coercing neutral secondary employers in all other situations regardless of the method of publicity utilized to achieve this objective.

The decision below, in effect, repeals this legislative balance. It creates—for the first time since the present language of Section 8(b)(4) became effective in 1959—wholly new criteria for adjudicating which activity falls

⁴ See, e.g., *Chicago Typographical Union No. 16 (Alden Press, Inc.)*, 151 NLRB 1666 (1965), holding that picketing and handbilling at shopping centers and public buildings to publicize a labor dispute did not constitute restraint and coercion under Section 8(b)(4) because this conduct was not directed at a secondary employer.

within the ambit of Section 8(b)(4). All handbilling or nonpicketing publicity, whether coercive or not, has now been deemed permissible. Only secondary picketing which urges a total boycott is now forbidden. The Court of Appeals' decision has thereby rendered the publicity proviso a nullity.

2. To reach this novel result, the court below substituted committee reports and comments by individual legislators for the statute's plain language. It is wrong, however, "to regard committee reports as drafted more meticulously and as reflecting the congressional will more accurately than the statutory text itself. Committee reports . . . do not embody the law. Congress, as Judge [now Justice] Scalia, recently noted, votes on the statutory words, not on different expressions packaged in committee reports. *Hirschey v. FERC*, 777 F.2d 1, 7-8 and n. 1 (D.C. Cir. 1985) (Scalia, J., concurring)." *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir.), *cert. granted*, 107 S. Ct. 666 (1986). See also *United States v. American College of Physicians*, 106 S. Ct. 1591, 1598 (1986) ("[D]espite the [Committee] Reports' seeming endorsement of a *per se* rule, we are hesitant to rely on that inconclusive legislative history . . . to supply a provision not enacted by Congress. . . .").

Reliance on the committee reports and statements of individual congressmen was particularly unjustified because the conclusion reached—exempting all non-picketing publicity—flies in the face of the statute's plain words. That conclusion also fosters the very type of industrial strife that Congress sought to preclude. Review of this important statutory question is warranted to ensure that

the fundamental goal of Congress to circumscribe labor disputes is not thwarted by artful judicial interpretation.

3. The decision below, if allowed to stand, would have far-reaching pernicious consequences for a multitude of varied enterprises. If the Union in this case is permitted to urge a boycott of all the stores in the large shopping center where the construction for Wilson's by High Construction, the primary employer, occurred, it could likewise handbill to impose a boycott upon a number of other secondary employers as well: the employers in every other shopping center where Wilson's does business; all other employers who do business with Wilson's, for example, any bank or newspaper or supplier or service operation that happened to have a business relationship with that company; the tenants in other shopping centers owned or operated by DeBartolo; or any other concern that has a business relationship of any kind with High Construction. The area of potential industrial strife will be immeasurably expanded beyond the bounds intended by Congress. There will be substantial adverse ramifications upon the operations of employers only remotely connected with the primary dispute. The goal of Section 8(b)(4), "to confine labor conflicts to the employer in whose labor relations the conflict has arisen" (*Miami Newspaper Pressmen's Local No. 46 v. NLRB*, 322 F.2d 405, 410 (D.C. Cir. 1963)) and to "shield . . . unoffending employers and others from pressure in controversies not their own" (*NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951)), will, in sum, be seriously eroded.

4. "On-the-spot handbilling," as well as picketing, can constitute a "particular[ly] effective form of pressure. People may be induced to act in a way they other-

wise would not. . . .” *Boxhorn’s*, 798 F.2d at 1020. “Handbilling, like picketing, involves conduct other than speech, namely, the physical presence of the person distributing leaflets . . . While the patrolling involved in picketing may in some cases constitute an interference with the use of public [or private] property greater than that produced by handbilling, it is clear that in other cases the converse may be true.” *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 315-16 (1968).

Labor organizations have not failed to appreciate this point. They have frequently resorted to consumer boycotts and to other nonpicketing publicity tactics that enmesh neutral companies in labor disputes to maximize their pressure upon the primary employer. By expanding the scope of the primary dispute, and thereby creating potential injury to a wide spectrum of employers, the unions anticipate that those secondary employers, as well as the public, will, in turn, force the primary employer to capitulate. The decision below provides a significant impetus to expand this alarming trend. It is essential that this Court determine whether the Act sanctions the use of this potent weapon.

CONCLUSION

For all the foregoing reasons, as well as those set forth in the Petition for Writ of Certiorari, the Chamber respectfully requests this Court to grant that Petition.

Dated: May 13, 1987.

Respectfully submitted,

STEPHEN A. BOKAT
NATIONAL CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062

Attorney for Amicus Curiae

JOINT APPENDIX

Supreme Court, U.S.
FILED
AUG 3 1987
JOSEPH F. SPANOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1986

THE EDWARD J. DEBARTOLO CORP.,
Petitioner,

v.

FLORIDA GULF COAST BUILDING AND
CONSTRUCTION TRADES COUNCIL,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

LAWRENCE M. COHEN
MARTIN K. DENIS
FOX AND GROVE, CHARTERED
233 South Wacker Drive
Sears Tower-Suite 7818
Chicago, Illinois 60606
(312) 876-0500

*Attorneys for the
Edward J. DeBartolo
Corp.*

CHARLES FRIED
Solicitor General
Department of
Justice
Wash., D.C. 20530
(203) 633-2216

NORTON J. COME
General Counsel
National Labor
Relations Board
Wash., D.C. 20570

*Attorneys for the
National Labor
Relations Board*

LAURENCE GOLD
815 16th St., N.W.
Wash., D.C. 20006
(202) 637-5390

*Attorney for the
Florida Gulf Coast
Building and
Construction Trades
Council*

PETITION FOR CERTIORARI FILED MARCH 11, 1987
CERTIORARI GRANTED JUNE 8, 1987

INDEX

	Page
Chronological List of Relevant Docket Entries	1A
Charge Against Labor Organization.	3A
Complaint and Notice of Hearing.	6A
Answer.	17A
Stipulation of Facts.	19A
Joint Exhibit 1 – Sample Standard Lease Agreement	28A
Joint Exhibit 2 – Lease By and Between Eastlake Square Associates and H.J. Wilson Co., Inc.	65A
Joint Exhibit 3 – The Handbill	84A
Joint Exhibit 5 – Plot Plan.	86A
Joint Exhibit 6 – Letter dated December 20, 1979 . .	87A
The following opinions, decisions, judgments, and orders have been omitted in printing this joint appen- dix because they appear on the following pages in the appendix to the printed Petition for Certiorari :	
Opinion Below of the United States Court of Appeals for the Eleventh Circuit	1A
Opinion Below of the National Labor Relations Board.	38A
Judgment of the United States Court of Appeals for Eleventh Circuit.	47A
Petition for Rehearing.	49A
Order Extending Time To File Petition For Writ Of Certiorari.	51A

**CHRONOLOGICAL LIST OF RELEVANT
DOCKET ENTRIES**

December 17, 1979	Charge, filed
February 4, 1980	Complaint and Notice of Hearing, dated
February 4, 1980	Union's Answer, dated
February 7, 1980	Regional Director's Order Setting Date, Time and Place of Hearing, dated
March 20, 1980	Regional Director's Order Rescheduling Hearing, dated
April 2, 1980	Stipulation of Facts entered into by the Parties, dated
May 22, 1980	Board's Order Approving Stipulation and Transferring Proceeding to the Board, dated
September 30, 1980	Decision and Order issued by the National Labor Relations Board
October 7, 1980	Board's Order Correcting Decision and Order, dated
October 20, 1981	Decision of the United States Court of Appeals for the Fourth Circuit, dated
January 26, 1982	Order of the the United States Court of Appeals for the Fourth Circuit denying rehearing en banc, filed
April 23, 1982	Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, filed

June 28, 1982	United States Supreme Court Order requesting Supplemental Memoranda regarding the question of mootness, dated
October 12, 1982	Petition for a Writ of Certiorari granted
June 24, 1983	Decision of the United States Supreme Court, dated
January 15, 1985	Supplemental Decision and Order of the National Labor Relations Board, filed
March 18, 1985	Petition for Review of Board's Order to the United States Court of Appeals for the Eleventh Circuit, filed
August 11, 1986	Decision of the United States Court of Appeals for the Eleventh Circuit, dated
November 12, 1986	Order of the the United States Court of Appeals for the Eleventh Circuit denying rehearing en banc, filed
November 24, 1986	Judgment of the the United States Court of Appeals for the Eleventh Circuit, issued
January 28, 1987	Order of the United States Supreme Court extending time to file Petition for Writ of Certiorari
March 11, 1987	Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, filed
June 8, 1987	Petition for a Writ of Certiorari granted

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

**CHARGE AGAINST LABOR ORGANIZATION
OR ITS AGENTS**

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

Do Not Write in This Space
Case No. 12-CC-1062
Date Filed 12/17/79

**1. LABOR ORGANIZATION OR ITS AGENTS
AGAINST WHICH CHARGE IS BROUGHT**

a. Name Florida Gulf Coast Building Trades Council, AFL-CIO

b. Union Representative to Contact J. G. Cain

c. Phone No. 621-6451 224-0174

d. Address (Street, city, State and ZIP code) 3505 Central Avenue Tampa, Florida 33603

e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) (4)(i)(ii)(B) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.) Since on or about December 13, 1979, and continuing to date, the above-named labor organization has engaged in, or induced or en-

couraged any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; and it has threatened, coerced, or restrained, persons engaged in commerce or in an industry affecting commerce, where in either case, an object was to force or require any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person.

3. Name of Employer The Edward J. DeBartolo Corp.

4. Phone No. 621-7575

5. Location of Plant Involved (Street, city, State and ZIP code) 5701 East Hillsborough Avenue, Tampa, Florida 33610

6. Employer Representative to Contact Harold E. Skipper

7. Type of Establishment (Factory, mine, wholesaler, etc.) Shopping Mall

8. Identify Principal Product or Service Shopping Mall

9. No. of Workers Employed 25

10. Full Name of Party Filing Charge The Edward J. DeBartolo Corp.

11. Address of Party Filing Charge (Street, city, State and ZIP code) 5701 East Hillsborough Avenue, Tampa, Florida 33610

12. Telephone No. 621-7575

13. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ Mark E. Levitt
(Signature of representative or person making charge)

Mark E. Levitt
Hogg, Allen, Ryce, Norton & Blue
First Florida Tower
Suite 2712
Tampa, Florida 33602

Address
Attorney
(Title or office, if any)
229-1341
(Telephone number)
12/17/79
(Date)

Willfully False Statements on This Charge Can Be
Punished by Fine and Imprisonment (U.S. Code,
Title 18, Section 1601)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
REGION 12

Case 12-CC-1062

FLORIDA GULF COAST BUILDING TRADES
COUNCIL, AFL-CIO

and

THE EDWARD J. DEBARTOLO CORP.

COMPLAINT AND NOTICE OF HEARING

(Dated February 4, 1980)

It having been charged by The Edward J. DeBartolo Corp. (herein called DeBartolo), that Florida Gulf Coast Building Trades Council (herein called Respondent) has been engaging in and is engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et seq. (herein called the Act), the General Counsel of the National Labor Relations Board (herein called the Board), on behalf of the Board, by the undersigned Regional Director for Region 12, pursuant to Section 10(b) of the Act, and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1.

The charge was filed by DeBartolo on December 17, 1979, and a copy thereof was duly served upon Respondent by registered mail on or about the same date.

(a) DeBartolo is an Ohio corporation with an office and place of business located in Tampa, Florida, where it is engaged in the leasing of space and management of shopping center malls, including East Lake Square Mall, located in Tampa, Florida.

(b) During the past 12 months, a representative period of time, DeBartolo derived in excess of \$100,000 gross revenue, of which in excess of \$25,000 was derived from Employers, which in turn meet other than a solely indirect standard for assertion of the Board's jurisdiction.

(c) DeBartolo is now, and has been at all times material herein, an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3.

(a) H. J. High Construction Company (herein High) is a Florida corporation with an office and place of business located in Orlando, Florida, where it is engaged as a general contractor in the building and construction industry at jobsites throughout the State of Florida.

(b) During the past 12 months, a representative period of time, High has performed services at its Florida construction sites, valued in excess of \$50,000 for various Employers, including Wilson's, which in turn meet a direct jurisdictional standard of the Board.

(c) High is now, and has been at all times material herein, an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

4.

(a) H. J. Wilson Co., Inc. (herein Wilson's) is a Louisiana corporation with an office and place of business

located in Tampa, Florida, where it is engaged in the business of operating retail department stores.

(b) During the past 12 months, a representative period of time, Wilson's has received revenues in excess of \$500,000, and in addition has received at its Tampa, Florida facilities, goods valued in excess of \$5,000 shipped to it directly from points located outside the State of Florida.

(c) Wilson's is now, and has been at all times material herein, an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

5.

Respondent is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

6.

At all times material herein, the tenant Employers of East Lake Square Mall, and each of them, have been and are now, persons engaged in commerce or in an industry affecting commerce, within the meaning of Section 8(b) (4) of the Act.

7.

(a) At all times material herein, and specifically since on or about December 13, 1979, Respondent has had a primary labor dispute with High involving the payment to its employees of alleged substandard wages and fringe benefits, in its construction of a retail store for Wilson's in East Lake Square Mall.

(b) At no time material herein has Respondent had any primary labor dispute with DeBartolo, Wilson's or the tenant Employers of East Lake Square Mall.

8.

(a) Between the approximate dates of December 13, 1979 and January 4, 1980, Respondent, in furtherance of its primary labor dispute with High as described in paragraph 7, subparagraph (a) above, has threatened, coerced or restrained, and is threatening, coercing or restraining, various tenant Employers who are engaged in business at East Lake Square Mall, and who lease space from DeBartolo in East Lake Square Mall, by handbilling the general public not to do business with the above-described tenant Employers because High allegedly pays substandard wages and fringe benefits to its employees constructing a retail store for Wilson's in East Lake Square Mall.

(b) An object of the acts and conduct of Respondent set forth in paragraph 8, subparagraph (a) above, was and is, to force or require the aforesaid tenant Employers in East Lake Square Mall, and other persons engaged in commerce or an industry affecting commerce, to cease using, handling, transporting, or otherwise dealing in products and/or services of, and to cease doing business with DeBartolo, in order to force DeBartolo and/or Wilson's not to do business with High.

9.

By the acts and conduct set forth in subparagraph 8(a) above, and by each of said acts, and for the object set forth in subparagraph 8(b) above, Respondent did engage in unfair labor practices in violation of Section 8(b) (4) (ii) (B) and Section 2(6) and (7) of the Act.

10.

The acts of Respondent described in paragraph 8 above, occurring in connection with the operations of the Em-

ployers described in paragraphs 2, 3 and 4 above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

11.

The acts of Respondent described above constitute unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(ii)(B) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on a date and time and place to be later designated, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB 4668, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Proceedings is attached.

You are further notified that, pursuant to Section 102.20 and 102.21 of the Board's Rules and Regulations, Respondent shall file with the undersigned Regional Director, an original and four copies of an answer to said complaint within 10 days from the service thereof, and that unless it does so, all of the allegations of the complaint shall be deemed to be admitted to be true and may be so found by the Board. Respondent shall immediately serve a copy of the answer, as required by the above sections of the Rules on each of the other parties.

DATED AT Tampa, Florida, this 4th day of February 1980.

/s/ Harold A. Boire
Harold A. Boire
Regional Director
National Labor Relations Board
Region 12
706 Federal Building
500 Zack Street
P. O. Box 3322
Tampa, Florida 33601

(SEAL)

SUMMARY OF STANDARD PROCEDURES IN FORMAL HEARINGS HELD BEFORE THE NATIONAL LABOR RELATIONS BOARD IN UNFAIR LABOR PRACTICE PROCEEDINGS PURSUANT TO SECTION 10 OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED

The hearing will be conducted by an Administrative Law Judge of the National Labor Relations Board who will preside at the hearing as an independent, impartial trier of the facts and the law whose decision in due time will be served on the parties. The offices of the Administrative Law Judges are located in Washington, D. C., and San Francisco, California.

At the date, hour, and place for which the hearing is set, the Administrative Law Judge, upon the joint request of the parties, will conduct a "prehearing" conference, prior to or shortly after the opening of the hearing, to assure that the issues are sharp and clearcut; or the Administrative Law Judge may independently conduct such a conference. The Administrative Law Judge will preside at such conference, but may, if the occasion arises, permit

the parties to engage in private discussions. The conference will not necessarily be recorded, but it may well be that the labors of the conference will be evinced in the ultimate record, for example, in the form of statements of position, stipulations, and concessions. Except under unusual circumstances, the Administrative Law Judge conducting the prehearing conference will be the one who will conduct the hearing; and it is expected that the formal hearing will commence or be resumed immediately upon completion of the prehearing conference. No prejudice will result to any party unwilling to participate in or make stipulations or concessions during any prehearing conference.

(This is not to be construed as preventing the parties from meeting earlier for similar purposes. To the contrary, the parties are encouraged to meet prior to the time set for hearing in an effort to narrow the issues.)

Parties may be represented by an attorney or other representative and present evidence relevant to the issues.

An official reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the Administrative Law Judge for approval.

All matter that is spoken in the hearing room while the hearing is in session will be recorded by the official reporter unless the Administrative Law Judge specifically directs off-the-record discussion. In the event that any party wishes to make off-the-record statements, a request to go off the record should be directed to the Administrative Law Judge and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. The Administrative Law Judge will allow an automatic exception to all adverse rulings and, upon appropriate order, an objection and exception will be permitted to stand to an entire line of questioning.

All exhibits offered in evidence shall be in duplicate. Copies of exhibits should be supplied to the Administrative Law Judge and other parties at the time the exhibits are offered in evidence. If a copy of any exhibit is not available at the time the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the Administrative Law Judge before the close of hearing. In the event such copy is not submitted, and the filing thereof has not for good reason shown been waived by the Administrative Law Judge, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. In the absence of a request, the Administrative Law Judge may ask for oral argument if, at the close of the hearing, it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

Any party shall be entitled, upon request made before the close of the hearing, to file a brief or proposed findings and conclusions, or both, with the Administrative Law Judge who will fix the time for such filing.

Attention of the parties is called to the following requirements laid down in Section 102.42 of the Board's Rules and Regulations, Series 8, as amended, with respect to the

procedure to be followed before the proceeding is transferred to the Board:

No request for an extension of time within which to submit briefs or proposed findings to the Administrative Law Judge will be considered unless received by the Chief Administrative Law Judge in Washington, D.C., (or, in cases under the San Francisco, California, branch office of Administrative Law Judges, the Deputy Chief Administrative Law Judge in charge of such office) at least 3 days prior to the expiration of time fixed for the submission of such documents. Notice of request for such extension of time must be served simultaneously on all other parties, and proof of such service furnished to the Chief Administrative Law Judge or Deputy Chief Administrative Law Judge, as the case may be. All briefs or proposed findings filed with the Administrative Law Judge must be submitted in triplicate, and may be in typewritten, printed, or mimeographed form, with service on the other parties.

In due course the Administrative Law Judge will prepare and file with the Board a decision in this proceeding, and will cause a copy thereof to be served on each of the parties. Upon filing of this decision, the Board will enter an order transferring this case to itself, and will serve copies of that order, setting forth the date of such transfer, on all parties. At that point, the Administrative Law Judge's official connection with the case will cease.

The procedure to be followed before the Board from that point forward, with respect to the filing of exceptions to the Administrative Law Judge's decision, the submission of supporting briefs, requests for oral argument before the Board, and related matters, is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and fol-

lowing sections. A summary of the more pertinent of these provisions will be served on the parties together with the order transferring the case to the Board.

Adjustments or settlements consistent with the policies of the Act reduce government expenditures and promote amity in labor relations. If adjustment appears possible, the Administrative Law Judge may suggest discussions between the parties or, upon request, will afford reasonable opportunity during the hearing for such discussions.

NATIONAL LABOR RELATIONS BOARD NOTICE

Case No. 12-CC-1062

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end. An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing.

However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements will not be granted unless good and sufficient grounds are shown and the following requirements are met:

- (1) The request must be in writing. An original and two copies must be served on the Regional Director;
- (2) Grounds therefor must be set forth in detail;

- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and
- (5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

Florida Gulf Coast Building
Trades Council, AFL-CIO
3505 Central Avenue
Tampa, FL 33603

Mark F. Kelly, Esquire
341 Plant Avenue
Tampa, Florida 33606

The Edward J. DeBartolo Corp.
5701 East Hillsborough Ave.
Tampa, Florida 33610

Mark E. Levitt, Esquire
Hogg, Allen, Ryce, Norton & Blue
First Florida Tower, Suite 2712
Tampa, Florida 33602

cc: Marc Jelovchan
Atlanta Reporting Service
P. O. Box 33
Neptune Beach, FL 32233

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
REGION 12

Case No. 12-CC-1062

FLORIDA GULF COAST BUILDING
TRADES COUNCIL, AFL-CIO,

Respondent,

and

THE EDWARD J. DeBARTOLO CORP.,
Employer.

ANSWER

(Dated February 4, 1980)

The Florida Gulf Coast Building Trades Council, AFL-CIO, the Respondent in the above-styled matter, answers the complaint pursuant to §102.20 of the Board's Rules and Regulations:

I.

The Respondent admits the allegations contained within the paragraphs of the complaint numbered 1, 2(a), 2(b), 2(c), 3(a), 3(b), 3(c), 4(a), 4(b), 4(c), 5, and 7(a).

II.

The Respondent is without knowledge as to the allegations contained within the paragraph of the complaint numbered 6, with the exception that the Respondent admits that various premises located at Eastlake Square Mall are occupied by tenants but the Respondent is without knowledge as to whether such tenants are employers within

the meaning of §2(2) of the Act and it is without knowledge as to whether such tenants are persons engaged in commerce or in an industry affecting commerce within the meaning of §§ 2(6) and 2(7) of the Act.

III.

The Respondent denies the allegations contained within the paragraphs of the complaint numbered 7(b), 8(a), 8(b), 9, 10, and 11.

/s/ Richard H. Frank
 Richard H. Frank,
 Law Offices of Frank, Chamblee
 & Kelly, P.A.
 341 Plant Avenue
 Tampa, Florida 33606
 (813) 251-0555
 Attorneys for Respondent

(Certificate of Service Omitted in Printing)

UNITED STATES OF AMERICA
 BEFORE THE NATIONAL LABOR
 RELATIONS BOARD
 REGION 12

Case 12-CC-1062

FLORIDA GULF COAST BUILDING
 TRADES COUNCIL, AFL-CIO

and

THE EDWARD J. DeBARTOLO CORPORATION

STIPULATION OF FACTS

(Dated April 2, 1980)

Comes now Florida Gulf Coast Building Trades Council, AFL-CIO, Respondent; The Edward J. DeBartolo Corporation, the Charging Party; and Counsel for the General Counsel, being all the parties to this proceeding, and hereby petition the Board, in order to effectuate the purposes of the Act and to avoid unnecessary costs and delay, to exercise its powers under Section 102.50 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, to transfer to and continue this proceeding before the Board and to accept this Stipulation of Facts.

1.

The parties agree that the charge, complaint, answer, the instant "Stipulation of Facts", and Exhibits attached thereto, constitute the entire record in the case, and that no oral testimony is necessary or desired by any of the parties. The parties further stipulate that they waive a hearing before an Administrative Law Judge, the making of findings of facts and conclusions of law by an

Administrative Law Judge and the issuance of an Administrative Law Judge's Decision, and desire to submit this case for findings of facts, conclusions of law, and a Decision and Order directly by the Board. The parties do not waive any rights to which they may be entitled after the issuance of Decision and Order of the Board.

2.

In the event the Board accepts this Stipulation of Facts and transfers this proceeding to the Board, the parties request that the Board set a reasonable period of time for filing of briefs and/or proposed findings of fact and conclusions of law.

3.

The instant charge was filed on December 17, 1979, by the Edward J. DeBartolo Corporation (herein DeBartolo), and a copy thereof was duly served upon Respondent Florida Gulf Coast Building Trades Council (herein the Union) on or about the same date.

4.

DeBartolo is an Ohio corporation with an office and place of business located in Tampa, Florida, where it is engaged in the leasing of space and management of shopping center malls, including East Lake Square Mall, located in Tampa, Florida. DeBartolo has nothing to do with the operation or management of any of the retail stores in the Mall, including Wilson's and Belk's, apart from those matters set forth in the applicable lease, property management or maintenance agreements. During the past twelve months, a representative period of time, DeBartolo derived in excess of \$100,000 gross revenue, of which in excess of \$25,000 was derived from Employ-

ers, which in turn meet other than a solely indirect standard for assertion of the Board's jurisdiction. DeBartolo is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

5.

H. J. Wilson Co., Inc. (herein Wilson's) is a Louisiana corporation with an office and place of business located in Tampa, Florida, where it is engaged in the business of operating retail department stores. During the past twelve months, a representative period of time, Wilson's has received in excess of \$500,000 in revenues, and in addition has received at its Tampa, Florida, facilities goods valued in excess of \$5,000 shipped to it directly from points located outside the State of Florida. Wilson's is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

6.

Belk Lindsey of Tampa, Inc. (herein Belk's) is a Florida corporation with an office and a place of business located in Tampa, Florida, where it is engaged in the business of operating retail department stores. During the past twelve months, a representative period of time, Belk's has received in excess of \$500,000 in revenues, and in addition has received at its Tampa, Florida facilities, goods valued in excess of \$50,000 shipped to it directly from points located outside the State of Florida. Belk's is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

7.

H. J. High Construction Company (herein High) is a Florida corporation with an office and place of business located in Orlando, Florida, where it is engaged as a general contractor in the building and construction industry at jobsites throughout the State of Florida. During the past twelve months, a representative period of time, High has performed services at its Florida jobsites, valued in excess of \$50,000 for various employers, including Wilson's, which in turn meet a direct jurisdictional standard of the Board. High is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

8.

Respondent Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

9.

At all times material herein, East Lake Square Mall, located in Tampa, Florida, has been an operating shopping center mall, owned and operated by DeBartolo through its subsidiary, Eastlake Square Associates. At no time germane to this Complaint has DeBartolo operated a retail store at East Lake Square Mall, nor does DeBartolo own any of the property on which the Belk's is located. East Lake Square Mall has approximately 85 tenant employers which, at all times material herein, have leased space in which to operate their respective stores from DeBartolo. At all times material herein, said tenant employers have been, and are now, persons engaged in commerce or in an industry affecting commerce, within the meaning of Section 8(b)(4) of the Act. Wilson's is a tenant of

DeBartolo while Belk's is not. DeBartolo has no control over the method or means by which any tenant or Belk's operates its business, except as provided in the applicable lease, property, or maintenance agreement. Neither does any tenant or Belk's have any control over the method or means by which DeBartolo or any other tenant or Belk's does business. Method or means as used herein and hereinafter includes, but is not limited to wages, hours, as well as working conditions and other matters dealing with labor relations. Copy of a sample standard lease agreement is attached as Joint Exhibit 1.

10.

DeBartolo, through its subsidiary, Eastlake Square Associates, has entered into a land lease with Wilson's, whereby Wilson's will build a department store that will connect to, and become part of the already operating East Lake Square Mall. Pursuant to the terms of the lease, Wilson's is totally responsible for the construction of its store and will own the structure. The responsibilities and duties of Wilson's and DeBartolo are more fully set forth in the lease, which is attached hereto as Joint Exhibit 2. Wilson's has contracted with High, a general contractor, to build its department store. High has employed its own employees, as well as contracted with various sub-contractors to build Wilson's Department Store. High is not a tenant of DeBartolo, does not engage in the operation of retail stores and does not have a contract to lease or purchase any property in or adjacent to the East Lake Square Mall. Apart from any provisions contained in Joint Exhibit 2, neither DeBartolo, nor any tenant, nor Belk's had or has anything to do with the selection of High by Wilson's or of Sub-contractors by High, nor do they or any of them in any way control, dictate or suggest the wages, hours or working conditions paid by High

to its employees or by any sub-contractor to its employees. Apart from any rights arising from Joint Exhibit 1, no tenant, nor Belk's has any control over the construction of the Wilson's store, including the method or means by which it is constructed.

11.

At no time germane to this Complaint has Wilson's operated a retail store at East Lake Square Mall.

12.

Neither DeBartolo, nor any tenant other than Wilson's, nor Belk's, has any contract or business relationship of any type with High. No tenant nor Belk's has any contract or business relationship with Wilson's.

13.

At all times material herein, Respondent Union has had a primary labor dispute with High involving the payment to its employees of alleged substandard wages and fringe benefits.

14.

Between the dates of December 13, 1979, and January 4, 1980, Respondent Union handbilled at the entrances to East Lake Square Mall [copy of handbill attached as Joint Exhibit 3]. The handbilling ceased only because of an Order of the Circuit Court of the 13th Judicial Circuit, Hillsborough County, Florida, enjoining such activity [copy of Order attached as Joint Exhibit 4].

15.

Joint Exhibit 5 is a plot plan of East Lake Square Mall. The handbilling took place at all four entrances to the

Mall which are identified by the letter "X" on Joint Exhibit 5. The four entrances are all located on the private property of DeBartolo but are utilized as means of ingress and egress to the retail stores located in the Mall.

16.

On December 20, 1979, Charging Party, by and through its attorney, sent a letter to Mark F. Kelly, attorney for Respondent, relating to Respondent's handbilling activity. [A copy of said letter is attached hereto as Joint Exhibit 6.] Respondent received this letter in due course. Thereafter, Respondent refused to agree to alter its activity in accordance therewith and continued to handbill in the same fashion as it had done since December 13, 1979.

17.

If it were not for the fact that High was and is performing construction work on the Wilson's store, Respondent would have no dispute with DeBartolo, Belk's or any tenant in the Mall and would have no cause to handbill at East Lake Square Mall.

18.

At all times material herein Belk's has maintained and operated a retail establishment within Hillsborough County, Florida, which is more particularly located at East Lake Square Mall. That retail establishment is located on land which Belk's owns. That land is comprised of approximately 10.72 acres of property within a larger parcel of property otherwise known as East Lake Square Mall. The property owned by Belk's includes the land upon which the store structure stands and the adjacent sidewalks and parking area.

26a

19.

The Wilson's and Belk's retail stores are competitor establishments. Belk's has no business relationship with Wilson's in any manner, and exercises no control over the construction of the Wilson's store to be located at East Lake Square Mall.

20.

Belk's has no contract with nor does it do business in any manner with High.

21.

The only business relationship between Belk's and DeBartolo is that Belk's pays DeBartolo for maintenance and security of common areas. Belk's does not in any way share or split its revenues from its East Lake Square Mall store with DeBartolo. Belk's pays no money or thing of value to any tenant in the Mall and has no business relationship with any of them, except as provided in any provision of the aforesaid lease, property, or maintenance agreements.

22.

Between the dates of January 8, 1980, and January 17, 1980, Respondent Union handbilled at the entrances to Belk's retail store with the identical handbill to that previously distributed at the mall entrances. The handbilling took place at the three entrances to the store itself, all of which took place upon Belk's property. [Location marked by the O's on plot plan, attached as Joint Exhibit 5]. The handbilling ceased only because of an Order of the Circuit Court of the Thirteenth Judicial Circuit, Hillsborough County, Florida, enjoining such activity [copy of said Order attached as Joint Exhibit 7].

27a

23.

Neither DeBartolo, Belk's nor any tenant has the ability to remove High as the general contractor on the construction project of the Wilson's store at East Lake Square Mall.

24.

The parties stipulate that the sole issue to be decided by the Board in this case is whether or not Respondent Union violated Section 8(b)(4)(B) of the Act by engaging in the handbilling activity detailed above.

25.

This stipulation is made without prejudice to any objection that any party may have as to the materiality or relevance of any fact stated herein.

26.

Counsel for the General Counsel moves to amend the Complaint to conform to the facts recited above.

Florida Gulf Coast Building Trades
Council, AFL-CIO

Dated: 4/2/80

By: /s/ Richard H. Frank

Attorney for Florida Gulf Coast
Building Trades Council, AFL-
CIO, Respondent

The Edward J. DeBartolo Corpora-
tion

Dated: 4/2/80

By: /s/ Mark E. Levitt

Attorney for the Edward J. De-
Bartolo Corporation, Charging
Party

The General Counsel

Dated: 4/2/80

By: /s/ Steven L. Sommers

Counsel for the General Counsel

JOINT EXHIBIT 1

INDEX OF LEASE

Between

and

<u>Article</u>	<u>Heading</u>	<u>Page</u>
I	Demised Premises.....	1
II	Term of Lease.....	1
III	Minimum Rent.....	2
IV	Percentage Rent.....	2
V	Real Estate Taxes.....	4
VI	Lessor's Work in the Demised Premises.....	5
VII	Lessee's Work and Approval of Lessee's Plans and Specifications.....	5
VIII	Use of Premises.....	6
IX	Merchants Association.....	8
X	Alterations.....	9
XI	Maintenance of Demised Premises and In- demnification.....	9
XII	Common Areas.....	10
XIII	Mechanic's Lien or Claims.....	13
XIV	Destruction and Restoration.....	13
XV	Property in Demised Premises.....	15
XVI	Access to Demised Premises.....	15
XVII	Surrender of Demised Premises.....	16
XVIII	Utilities.....	16
XIX	Assignment and Subletting.....	16

<u>Article</u>	<u>Heading</u>	<u>Page</u>
XX	Eminent Domain.....	17
XXI	Default by Lessee.....	17
XXII	Default by Lessor.....	19
XXIII	Estoppel Certificate, Attornment and Subordination.....	20
XXIV	Holding Over.....	20
XXV	Quiet Enjoyment.....	20
XXVI	Security Agreement.....	21
XXVII	Reimbursement.....	21
XXVIII	Changes and Additions to Shopping Center....	21
XXXIX	Titles of Articles.....	22
XXX	Notices.....	22
XXXI	Definition of Terms.....	22
XXXII	Invalidity of Particular Provisions.....	24
XXXIII	Provisions Binding.....	24
XXXIV	Relationship of Parties.....	24
XXXV	Brokerage.....	24
XXXVI	Complete Agreement.....	25

• • •

ARTICLE III—Minimum Rent

Lessee shall pay to Lessor as Minimum Rent for the Demised Premises the sum of _____ Dollars (\$ _____) per annum in equal monthly installments of _____ Dollars (\$ _____) each, all in advance, on the first day of every calendar month during the term hereof. If the term of this Lease shall commence on a day other than the first day of the month, Lessee shall pay Minimum Rent equal to one-thirtieth (1/30th) of the monthly Minimum Rent multiplied by the number of rental days of such fractional month. In the event any installment of Minimum Rent or other charges accruing under the Lease shall become overdue, a "Late Charge" of five cents (5¢) per each dollar so overdue may be charged by Lessor for the purpose of defraying the expense incident to handling such delinquent payment.

If the Shopping Center shall at any time during the term of this Lease, contain in excess of _____ department stores, the Minimum Rent herein provided for shall automatically be increased ten percent (10%) upon the date each additional department store in excess of 60,000 square feet opens for business.

ARTICLE IV—Percentage Rent

1. In addition to the payment of Minimum Rent, Lessee shall pay to Lessor for each Lease Year of the term hereof as Percentage Rent, an amount, if any, equal to _____ percent (____%) of Adjusted Gross Sales made at, in, on or from the Demised Premises during such Lease Year in excess of _____ (hereinafter referred to as "Percentage Break Point"). In the event of a Partial Lease Year, the Percentage Rent will be an amount, if any, equal to _____ percent (____%) of Adjusted Gross Sales made at, in, on or from the Demised Premises during such Partial Lease Year in excess of the

Percentage Break Point which shall be proportionately reduced based upon the period of time contained in such Partial Lease Year. The Percentage Break Point for such Partial Lease Year shall be determined by multiplying the Percentage Break Point for the first lease Year by a fraction the numerator of which shall be the number of days contained in such Partial Lease Year and the denominator of which shall be 365 days.

2. "Adjusted Gross Sales", as used herein, shall mean the amount of gross sales, income, receipts, revenues and charges of, in connection with and for all merchandise, services or other operations or businesses sold or rendered at, in, on or from the Demised Premises by Lessee or any subtenants, licensees or concessionaires, whether for cash or on a charge, credit or time basis, without reserve or deduction for inability or failure to collect, including, but not limited to, such sales and services (a) where orders originate and/or are accepted by Lessee in the Demised Premises but delivery or performance thereof is made from or at any place other than the Demised Premises; (b) pursuant to mail, telegraph, telephone or other similar orders received or filled at or in the Demised Premises; (c) by means of mechanical and other vending machines in the Demised Premises; (d) which Lessee in the normal and customary course of business would credit or attribute to its business upon the Demised Premises or any part or parts thereof, adjusted by the deduction, if originally included in gross sales or exclusion, as the case may be, from gross sales of the following, provided that separate records are maintained for such deductions or exclusions: (a) amounts of refunds, allowances made on merchandise claimed to be defective or unsatisfactory or discounts to customers, provided that if such refunds, allowances or discounts are in the form of credits to customer, such credits shall be included in gross sales when used; (b) exchanges of merchandise between stores of Lessee where such exchanges are made solely for the operation of Lessee's business and not for the purposes of consummating a sale which has been made

at, in, on or from the Demised Premises and/or for the purpose of depriving Lessor of the benefit of such sale which otherwise would have been made at, in, on or from the Demised Premises; (c) returns to shippers and manufacturers for credit; (d) sale of trade fixtures or store operating equipment after use thereof in the conduct of Lessee's business in the Demised Premises; (e) all sums and credits received in settlement of claims for loss or damage to merchandise; and (f) amount of any excise or sales tax levied upon retail sales and payable over to the appropriate governmental authority provided that specific record is made at the time of each sale of the amount of sales tax, and the amount thereof is expressly charged to the customer.

3. Percentage Rent for each Lease Year shall become due and payable either thirty (30) days after the last day of each Lease Year or on the 15th day of the month immediately following the month during which said Adjusted Gross Sales exceeds the Percentage Break Point for such Lease Year and thereafter shall be paid monthly on all additional Adjusted Gross Sales made during the remainder of such Lease Year, whichever occurs first. Percentage Rent for a Partial Lease Year shall become due and payable thirty (30) days after the last day of such Partial Lease Year. Lessee, or Lessee's store manager or designated representative shall submit to Lessor's mall manager at the Shopping Center, on or before the 5th day of each month of each Lease Year or Partial Lease Year, a written unaudited statement showing Lessee's gross sales, itemized deductions and exclusions for the preceding calendar month, signed by Lessee, or Lessee's store manager or designated representative. In addition to the foregoing, Lessee shall submit to Lessor, on or before the 30th day following the end of each Lease Year and Partial Lease Year, a written audited statement showing Lessee's gross sales, itemized deductions and exclusions for the preceding Lease Year or Partial Lease Year, signed by Lessee and certified under oath to be complete and

correct. Within fifteen (15) days after the request of Lessor, Lessee shall submit to Lessor a written audited statement showing Lessee's gross sales, itemized deductions and exclusions for the preceding three (3) calendar months, signed by Lessee and certified under oath to be complete and correct. Lessor shall not request such statements more than four (4) times during any Lease Year or Partial Lease Year. If Lessee shall fail to prepare and deliver any such statement of gross sales required herein, Lessor, in addition to other rights or remedies it may have and upon ten (10) days notice to Lessee, may elect to make an audit of all books and records of Lessee, including Lessee's bank accounts, and to prepare the statement or statements which Lessee has failed to prepare and deliver. Such audit shall be made and such statement or statements shall be prepared by an accountant selected by Lessor. The statement or statements so prepared shall be conclusive on Lessee, and Lessee shall pay on demand all expenses of such audit and of the preparation of any such statements and all sums, if any, as may be shown by such audit to be due as Percentage Rent.

4. Lessee shall keep upon the Demised Premises or at its principal office, books and records in accordance with generally accepted accounting principles consistently applied in which shall be recorded Adjusted Gross Sales for the Demised Premises. The books and records of account shall also include all federal, state and local tax returns and all pertinent original sales records of Lessee relating to Lessee's sales. Pertinent original sales records shall be separately maintained for the Demised Premises and shall include: (a) daily dated cash register tapes, including tapes from temporary registers; (b) serially numbered sales slips; (c) the originals of all mail orders at and to the Demised Premises; (d) the original records of all telephone orders at and to the Demised Premises; (e) settlement report sheets of transactions with subtenants, concessionaires and licensees; (f) the original records showing that

merchandise returned by customers was purchased at the Demised Premises by such customers; (g) memorandum receipts or other records of merchandise taken out on approval; (h) Lessee's bank accounts [separate bank account(s) shall be maintained for receipts from the Demised Premises and no receipts and/or refunds from any other source shall be deposited in such account(s)]; (i) daily and/or weekly transaction reports; and (j) such other sales records, if any, which would normally be examined by an independent accountant pursuant to accepted auditing standards in performing an audit of Lessee's sales. Such books and records shall be open to the inspection of Lessor and Lessor's duly authorized agents at all reasonable times, during business hours, at any time during the term of this Lease and for a period of at least one (1) year after the termination of this Lease. If Lessor should make an audit of Lessee's records and Lessee's gross sales statement should be found to be understated by more than two percent (2%) in any Lease Year, then Lessee, in addition to paying the Percentage Rent due, if any, for such understatement, shall pay to Lessor the cost of audit. The cost of such audit shall be determined on a time and expense basis and the rate per hour shall not exceed that charged for similar personnel by a national firm of independent Certified Public Accountants.

5. If Lessee shall fail to pay Percentage Rent in an amount equal to at least twenty-five percent (25%) of the annual Minimum Rent payable pursuant to Article III of this Lease in at least one (1) of the first five (5) Lease Years of the term of this Lease, then Lessor may elect to terminate this Lease by notice to Lessee given within six (6) months after the end of the fifth Lease Year and this Lease shall terminate and be null and void ninety (90) days after delivery of such notice; provided, however, Lessee may render such notice of termination inoperative if Lessee shall, within thirty (30) days after receipt of such notice, agree in writing to increase the Minimum Rent payable for the sixth Lease Year and each Lease Year thereafter to an

amount equal to one hundred twenty-five percent (125%) of the Minimum Rent payable for the sixth Lease Year and each Lease Year thereafter.

* * *

ARTICLE VII—Lessee's Work and Approval of Lessee's Plans and Specifications

1. Promptly after Lessor notifies Lessee that the shell of the Demised Premises is ready for commencement of Lessee's work, Lessee shall commence and thereafter complete with due diligence its construction work and installation of fixtures in accordance with its construction obligations set forth in Exhibit "A", Part II, "Lessee's Work Done at Lessee's Expense", annexed hereto and in accordance with its Preliminary Plans and Specifications and its Working Plans and Specifications, as provided for herein. If Lessee shall neglect, fail or refuse to commence its work as aforesaid and thereafter neglects, fails or refuses to diligently proceed with and complete its work, then Lessor, in addition to other rights or remedies it may have and, after thirty (30) days notice to Lessee, may (a) complete Lessee's work at Lessee's expense and thereupon commence the term of this Lease, (b) commence the term of this Lease and all of Lessee's payment obligations hereunder, notwithstanding the incompleteness of Lessee's work, or (c) declare this Lease cancelled and of no further force and effect.

2. Lessee may, but only with the consent of Lessor, enter the Demised Premises for preliminary work prior to the completion of Lessor's work, provided that Lessee's work shall be done in such manner so as not to interfere with the completion of Lessor's work, and provided also that Lessee's work does not interfere with any of Lessor's labor agreements.

3. Lessee shall furnish to Lessor all certificates and approvals with respect to work done by Lessee or on Lessee's behalf that may be required from an authority for the issuance

of a certificate of occupancy and Lessor shall have no responsibility or liability whatsoever for any loss or damage to any fixtures or equipment installed or left in the Demised Premises and Lessee's entry on and occupancy of the Demised Premises prior to the commencement of this Lease shall be governed by and subject to all the provisions, covenants and conditions of this Lease other than those requiring the payment of Minimum Rent and other charges, except utility charges.

4. Lessee shall furnish Preliminary Plans and Specifications incorporating Lessee's construction obligations under Exhibit "A" for Lessor's prior approval within fifteen (15) days after Lessor's architects provide Lessee with an Outline Plan for the Demised Premises. Within thirty (30) days after approval by Lessor of Lessee's Preliminary Plans and Specifications, Lessee shall submit Working Plans and Specifications for Lessor's review and prior approval. The approval by Lessor of the Preliminary Plans and Specifications and the Working Plans and Specifications shall not constitute the assumption of any liability on the part of Lessor for their compliance or conformity with applicable building codes and the requirements of this Lease or for their accuracy, and Lessee shall be solely responsible for such plans and specifications.

5. Lessee may erect illuminated signs on the interior mall front of the Demised Premises and shall maintain said signs in a good state of repair and save Lessor harmless from any loss, cost or damage as a result of the erection, maintenance, existence or removal of the same; and shall repair any damage which may have been caused by the erection, existence, maintenance or removal of such signs. All signs shall be in accordance with Lessor's Sign Specifications, a copy of which will be attached to the Outline Plan and shall be approved in writing by Lessor. Upon vacating the Demised Premises, Lessee shall remove all signs and repair all damage caused by such removal.

ARTICLE VIII—Use of Premises

1. Lessee shall operate its business in the Demised Premises during the term of this Lease under the name _____ and the Demised Premises shall be occupied and used for the purpose of _____

_____ and for no other purpose.

2. Lessee shall not abandon or leave vacant the Demised Premises, shall not permit, license, or suffer the occupancy of any other party in the Demised Premises and shall:

(a) Keep the Demised Premises continuously and uninterruptedly open for business at least from 10:00 a.m. to 9:30 p.m. Monday through Saturday and during such hours on Sunday that at least one (1) department store in the Shopping Center and fifty percent (50%) of the other tenants in Lessor's parcel are open for business, unless prevented from doing so by strikes, fire, casualty or other causes beyond Lessee's control.

(b) Conduct no auction, fire or bankruptcy sales or similar practice.

(c) Display no merchandise outside the Demised Premises nor in any way obstruct the malls or sidewalks adjacent thereto and store all trash and refuse in appropriate containers within the Demised Premises and attend to the daily disposal thereof in the manner designated by Lessor. Lessee shall not burn any trash or rubbish in or about the Demised Premises or anywhere else within the confines of the Shopping Center. Lessee shall not operate a garbage grinder without Lessor's prior consent. If Lessor elects to provide refuse compactor service in the Shopping Center, Lessee shall use said service exclusively for dis-

posal of all waste. In the event compactor service is not provided, Lessee shall use a refuse disposal service approved by Lessor.

(d) Load or unload all merchandise, supplies, fixtures, equipment and furniture and cause the collection of rubbish only through the rear service door or doors of the Demised Premises. No deliveries of any kind shall be made through the front entrance.

(e) Keep the Demised Premises in a careful, safe, clean and proper manner; and not permit any rubbish or refuse of any nature emanating from the Demised Premises to accumulate in the mall areas or rear delivery area.

(f) Not solicit business in the Common Areas or distribute any handbills or other advertising matter in the Common Areas.

(g) Prevent the Demised Premises from being used in any way which will injure the reputation of the same or of the Shopping Center of which it is a part or from being used in any way which may be a nuisance, annoyance, inconvenience or damage to the other tenants or occupants of the Shopping Center, including, without limiting the generality of the foregoing, the operation of any instrument or apparatus or equipment or the carrying on of any trade or occupation which emits an odor discernible outside of the Demised Premises and which may be deemed offensive in the nature or noise by the playing of any musical instrument or radio or television or the use of a microphone, loud speaker, electrical equipment or other equipment which may be heard outside of the Demised Premises.

(h) Display or affix no sign, advertising, placard, name, trademark, insignia, decal, advertising matter or any

other item or items on any exterior door, wall or window or within any display window space in the Demised Premises or within five (5) feet of the front of the Demised Premises in the case of an open storefront, or within any entrance to the Demised Premises. Lessor shall have the right, without notice to Lessee and without any liability for damage to the Demised Premises reasonably caused thereby, to remove any items displayed or affixed in violation of the foregoing provisions.

(i) Abide by all reasonable rules and regulations established by Lessor, from time to time, with respect to the common areas, facilities, improvements and sidewalks.

3. Upon the commencement of the term of this Lease, Lessee shall proceed with due dispatch and diligence to open for business in the Demised Premises and shall thereafter continuously, actively and diligently operate its said business on the whole of the Demised Premises, in a high grade and reputable manner maintaining in the Demised Premises an adequate staff of employees and a full and complete stock of merchandise, during business hours throughout the term of this Lease unless prevented from so doing by fire, strikes or other contingencies beyond the control of Lessee. If Lessee fails to open for business within thirty (30) days after the commencement of the term or fails to thereafter keep the Demised Premises open each business day during the hours specified herein, then Lessee shall pay as rent during each day the Demised Premises are not open or in which such hours are not maintained an amount equal to one hundred twenty-five percent (125%) of the Minimum Rent determined on a per diem basis pursuant to Article III. Said amount shall be in addition to other charges due under this Lease and shall represent the agreed liquidated damages to Lessor as the exact amount of damages to Lessor cannot be ascertained with certainty. The right to receive such liquidated damages shall be in addition to all other rights or remedies Lessor may have.

4. Lessee shall not use, occupy, suffer or permit the Demised Premises or any part thereof to be used or occupied for any purpose contrary to law or the rules or regulations of any public authority or the requirements of any insurance underwriters or rating bureaus or in any manner so as to increase the cost of insurance to Lessor over and above the normal cost of such insurance for the use above permitted for the type and location of the building of which the Demised Premises are a part. Lessee shall, on demand, reimburse Lessor for all extra premiums caused by Lessee's use of the Demised Premises, whether or not Lessor has consented to such use. Nothing contained herein shall permit a use other than the use hereinbefore provided. Lessee shall promptly comply with all present and future laws, regulations or rules of any county, state, federal and other governmental authority and any bureau and department thereof, and of the National Board of Fire Underwriters or any other body exercising similar function which may be applicable to the Demised Premises, including the making of any required structural changes thereto. If Lessee shall install any electrical equipment that overloads the lines in the Demised Premises, Lessee shall make whatever changes are necessary to comply with the requirements of the insurance underwriters and governmental authorities having jurisdiction thereover.

ARTICLE IX—Merchants Association

Lessee shall become a member of any Merchants association formed by the tenants of the Shopping Center and approved by Lessor, abide by all rules and regulations established by said Merchants Association and maintain such membership. Lessee shall cooperate in any Merchants Association's Shopping Center wide sales and promotions and advertise annually in at least four (4) Shopping Center wide Merchants Association newspaper sections or advertisements as from time to time determined by the Board of Directors of the

Merchants Association. The minimum size of such advertisements shall be either one-eighth ($1/8$) page in a full-sized newspaper section, or one-fourth ($1/4$) of a page of a tabloid size advertisement. In addition to the foregoing, Lessee shall pay as its share of the cost of the activities conducted by the Merchants Association the sum of twenty-five cents (25¢) per year for each square foot of Floor Area contained in the Demised Premises, hereinafter referred to as "Merchants Association Payment", payable in advance in quarter annual installments, plus a nonrecurring fee of twenty-five cents (25¢) for each square foot of Floor Area contained in the Demised Premises as an initial membership fee in such Merchants Association. Commencing with the second Lease Year (or first Lease Year in the event of a Partial Lease Year), and each Lease Year thereafter, the Merchants Association Payment shall be adjusted upward or downward in the manner set forth below, but never less than the above amount. The amount of the Merchants Association Payment for each Lease Year, commencing with the second Lease Year (or first Lease Year in the event of a Partial Lease Year), shall be determined as follows: Using the All Items portion of the "Consumer Price Index for All Urban Consumers" (1967 = 100), published by the Bureau of Labor Statistics of the United States Department of Labor, applicable on the date of this Lease as the denominator and the index number for the first month of each Lease Year thereafter as the numerator and multiplying said resulting fraction times the above stated Merchants Association Payment. In the event that the Bureau of Labor Statistics shall change the base period, the new index numbers shall be substituted for the old index numbers in making the above computation. In the event such Consumer Price Index of the Bureau of Labor Statistics of the United States Department of Labor is discontinued, Lessor shall select another index published by a department or agency of the United States Government to be substituted for the prior index, with any appropriate adjustment required because of the predecessor index. This

procedure shall continue until such time as no such index is so published, at which time Lessor shall reasonably substitute an index prepared by any appropriate government, corporation or other entity.

* * *

ARTICLE XII—Common Areas

1. Lessor hereby grants to Lessee, during the term of this Lease, a nonexclusive use of the Common Areas for pedestrian and vehicular traffic. The Common Areas shall be subject to the exclusive control and management of Lessor and to such rules and regulations as Lessor may, from time to time, adopt and Lessor reserves the right to change the areas, locations and arrangement of parking areas and other Common Areas; to enter into, modify and terminate easements and other agreements pertaining to the maintenance and use of the parking areas and other Common Areas; to close any or all portions of the Common Areas to such extent as may, in the opinion of Lessor's counsel, be legally sufficient to prevent a dedication thereof or the accrual of any rights to any person or to the public therein; to close temporarily, if necessary, any part of the Common Areas in order to discourage noncustomer parking; and to make changes, additions, deletions, alterations or improvements in and to such Common Areas, provided that there shall be no unreasonable obstruction of Lessee's right of ingress to or egress from the Demised Premises.

2. Lessor shall operate, maintain and repair the Common Areas in such manner as Lessor shall in its sole discretion determine. For these services Lessee shall pay its proportionate share of the cost and expense to Lessor of operating, maintaining and repairing the Common Areas (hereinafter referred to as "Common Area Maintenance Costs") during the term of this Lease, including any period during which Lessee shall transact business in the Demised Premises prior to the commencement

of the term of this Lease. For the purposes of this Article, the term "Common Area Maintenance Costs" shall mean all sums incurred in connection with the operation, maintenance and repair of the Common Areas, and shall include, but not be limited to, the costs and expenses of [the following subparagraphs (a) through (j) are for definition only and are not to be construed so as to impose any obligations on Lessor]:

- (a) snow, ice, garbage and trash removal; maintenance, repair and replacement of all parking lot surfaces, service areas and courts, including cleaning, sweeping, painting, striping and repaving; maintenance, repair and replacement of sidewalks, curbs, guardrails, bumpers, fences, screens, flagpoles, bicycle racks, Shopping Center identification signs, directional signs, traffic signals, and other traffic markers and signs;
- (b) maintenance, repair and replacement of the (i) storm and sanitary drainage systems, including disposal plants and lift stations and retention ponds or basins; (ii) irrigation systems; (iii) electrical, gas, water and telephone systems; (iv) lighting systems (including bulbs, poles and fixtures); (v) emergency water and sprinkler systems; (vi) other utility systems; (vii) heating, ventilating and air conditioning systems; and (viii) security systems, including any utility charges in connection with any of the foregoing systems;
- (c) interior and exterior planting, replanting and replacing of flowers, shrubbery, plants, trees and other landscaping;
- (d) maintenance, repair and replacement of all portions of the buildings, both interior and exterior, on Lessor's Parcel (excluding the Demised Premises and premises leased to other tenants), including, but not limited to,

floors, floor coverings, ceilings, walls, roofs and roof flashings, canopies, skylights, signs, planters, benches, fountains, elevators, escalators and stairs, fire exits, doors and hardware, windows, glass and glazing;

- (e) premiums or contributions for insurance, including, without limitation, liability insurance for personal injury, death and property damage; insurance against liability for defamation and claims of false arrest occurring in and about the Common Areas; workman's compensation; broad form all peril insurance covering the Common Areas in the Shopping Center which may include flood insurance, earthquake insurance, boiler insurance and/or rent insurance [for the purposes of this provision of subparagraph (e), Common Areas shall be deemed to include the Demised Premises and premises leased to other tenants];
- (f) maintenance, repair and acquisition cost (rental fees and/or purchase price or in lieu of purchase price, the annual depreciation allocable thereto) of all security devices, machinery and equipment used in the operation and maintenance of the Common Areas, and all personal property taxes and other charges incurred in connection with such security devices, machinery and equipment;
- (g) all license and permit fees, and all parking surcharges that may result from any environmental or other laws, rules, regulations, guidelines or orders; the cost of obtaining and operating public transportation or shuttle bus systems as used in connection with bringing customers to the Shopping Center or if required by any environmental or other laws, rules, regulations, guidelines or orders;
- (h) the cost of installation and operation of music program services and loudspeaker systems;

- (i) personnel, including, without limitation, security and maintenance people on the Shopping Center, the mall manager and assistant mall manager, secretaries and mall management bookkeepers (including, without limitation, the payroll taxes and employee benefits of such personnel); and
- (j) Lessor's administrative costs in an amount equal to fifteen percent (15%) of the total Common Area Maintenance Costs.

Notwithstanding the foregoing provisions, Common Area Maintenance Costs shall not include:

- (a) depreciation (other than depreciation as above specified);
- (b) costs of repairing and replacing to the extent that proceeds of insurance or condemnation awards are received therefor; and
- (c) costs of a capital nature to the extent they improve the Common Areas beyond their original condition or utility as they may be put from time to time by Lessor.

In calculating Lessee's proportionate share of the Common Area Maintenance Costs, the contributions, if any, paid by department stores and "variety or specialty stores" to Lessor towards Common Area Maintenance Costs shall be subtracted from Common Area Maintenance Costs before determination of Lessee's proportionate share thereof. For the purposes of this Lease, a "variety or specialty store" is an occupant which leases or occupies 15,000 square feet or more of building space in the Shopping Center. If Lessor from time to time acquires, or makes available, additional land for parking or other common area purposes, then Common Areas shall include such additional land.

3. Lessee's proportionate share of the Common Area Maintenance Costs shall be computed by multiplying the total

amount of the Common Area Maintenance Costs each year by a fraction, the numerator of which shall be the Floor Area of the Demised Premises and the denominator of which shall be the average of the total square feet of all building space open for business in Lessor's Parcel (excluding all building space leased to department stores and "variety or specialty stores") on the first day of each month of the calendar year in which such cost was incurred.

Lessee's proportionate share of Common Area Maintenance Costs for each full calendar year and partial calendar year shall be paid in monthly installments on the first day of each calendar month, in advance, in an amount estimated by Lessor from time to time, hereinafter referred to as "Common Area Maintenance Payment". Subsequent to the end of each full calendar year or partial calendar year, Lessor shall notify Lessee of Lessee's proportionate share of Common Area Maintenance Costs for such full calendar year or partial calendar year. Lessor shall include in such notice, a certification of the Common Area Maintenance Costs by an independent Certified Public Accounting firm designated by Lessor, and such certification shall be deemed conclusive as to the actual amount of Common Area Maintenance Costs. The fee for such certification of Common Area Maintenance Costs shall be included in the Common Area Maintenance Costs. If the Common Area Maintenance Payment paid by Lessee pursuant to this Article for any full or partial calendar year shall be less than the actual amount due from Lessee for such year as shown on such notice, Lessee shall pay to Lessor the difference between the amount paid by Lessee and the actual amount due, within ten (10) days after receipt of such notice. If the total amount paid by Lessee for any full or partial calendar year shall exceed the actual amount due from Lessee for such full or partial calendar year, such excess shall be credited against the next Common Area Maintenance Payment due from Lessee to Lessor pursuant to this Article. If the date that the term of this

Lease commences or the date Lessee opens for business in the Demised Premises, whichever date shall first occur, (hereinafter referred to as "Effective Date") is a day other than the first day of the calendar year, or if the term of this Lease shall end on a day other than the last day of the calendar year, then Lessee's proportionate share of Common Area Maintenance Costs shall be billed and adjusted on the basis of such fraction of a calendar year. If the Effective Date occurs in the calendar year during which the Shopping Center initially opens for business, then the Common Area Maintenance Costs for such partial calendar year shall be reduced by a fraction, the numerator of which shall be the number of days from the Effective Date through the following December 31 and the denominator of which shall be the number of days from the date the Shopping Center opened for business through the following December 31st.

4. Lessor shall protect, indemnify and save harmless Lessee against and from all claims, loss, cost, damage or expense arising out of or from any accident or other occurrence on that portion of the Common Areas located on Lessor's Parcel, except for the willful acts or negligence of Lessee, its agents, subtenants, employees, contractors or assignees.

5. Lessor shall provide public liability insurance (either through the purchase of insurance or a funded self-insurance plan) on that portion of the Common Areas located on Lessor's Parcel providing coverage of not less than Five Hundred Thousand Dollars (\$500,000) against liability for injury to or death of any one person and One Million Dollars (\$1,000,000) for any one occurrence, or in lieu of the foregoing a combined single bond of at least One Million Dollars (\$1,000,000).

6. Lessee shall cause it and its employees to park only in the outer areas of the parking lot or such places as provided and designated by Lessor for employee parking. Within ten (10) days after the request by Lessor, Lessee shall deliver to Lessor a

list of Lessee's and its employees' automobiles which such list shall set forth the description of and the state automobile license numbers assigned to such automobiles. Thereafter, Lessee shall advise Lessor of any changes, additions or deletions in such list. If any automobile appearing on said list is parked in any area of the Shopping Center other than the area designated by Lessor at any time after Lessor has given notice to Lessee or Lessee's store manager that the same automobile has previously been parked in violation of this provision, then Lessee shall pay to Lessor the sum of Ten Dollars (\$10) per day for each such automobile for each day (or part thereof) it is parked in violation of this provision. Lessee shall pay such sum to Lessor within ten (10) days after receipt of notice from Lessor.

* * *

ARTICLE XVIII—Utilities

1. Lessee shall contract for, in its own name, and shall pay before delinquency, for all utility services rendered or furnished to the Demised Premises, including heat, water, gas, electricity, fire protection, sewer rental, sewage treatment facilities and the like, together with all taxes levied or other charges on such utilities. If Lessor shall supply any such services, or if any such services are required to be paid for by Lessor under a master meter, Lessee shall purchase same from Lessor at charges not in excess of the charges for the service in question made by any public utility corporation or governmental agency supplying such utilities in the area plus an additional ten percent (10%) for Lessor's overhead costs. Any such charges for service supplied by Lessor shall be due and payable within ten (10) days after billings therefor are rendered to Lessee. In no event shall Lessor be liable for the quality, quantity, failure or interruption of such service to the Demised Premises.

2. Lessor may, with notice to Lessee, or without notice in the case of an emergency, cut off and discontinue gas, water,

electricity and any or all other utilities whenever such discontinuance is necessary in order to make repairs or alterations. No such action by Lessor shall be construed as an eviction or disturbance of possession or as an election by Lessor to terminate this Lease, nor shall Lessor be in any way responsible or liable for such action.

* * *

ARTICLE XXV—Quiet Enjoyment

Lessor agrees that if Lessee pays the Minimum and Percentage Rent and other charges herein provided and shall perform all of the covenants and agreements herein stipulated to be performed on Lessee's part, Lessee shall, at all times during said term, have the peaceable and quiet enjoyment and possession of the Demised Premises without any manner of hindrance from Lessor or any persons lawfully claiming through Lessor, except as to such portion of the Demised Premises as shall be taken under the power of eminent domain.

* * *

ARTICLE XXVIII—Changes and Additions to Shopping Center

1. Lessor shall have the exclusive right to use all or any part of the roof over the Demised Premises and exterior walls of the Demised Premises for any purpose; to erect in connection with the construction thereof temporary scaffolds and other aids to construction on the exterior of the Demised Premises, provided that access to the Demised Premises shall not be denied; and to install, maintain, use, repair and replace pipes, ducts, conduits and wires leading through the Demised Premises and serving other parts of the Shopping Center in locations which will not materially interfere with Lessee's use thereof. In addition to the foregoing, Lessor may make any use it desires of the side and rear walls of the Demised Premises, provided that

there shall be no encroachment upon the interior of the Demised Premises. Lessor hereby reserves the right at any time to make alterations or additions to, and to build additional stories on, the building in which the Demised Premises are contained and to build adjoining the same. Lessor also reserves the right to construct other buildings or improvements in the Shopping Center from time to time and to make alterations thereof or additions thereto and to build additional stories on such building or buildings and to incorporate additional land into Lessor's Parcel and build thereon and to construct deck or elevated parking facilities.

2. If at any time (a) Lessor is required by any laws, ordinances, rules or regulations of any governmental agency having jurisdiction over the Shopping Center to provide additional parking in Lessor's Parcel, or (b) Lessor proposes to increase the total rentable building space within the Shopping Center which would require additional parking in the Shopping Center, Lessor may elect to provide such additional parking by constructing deck or elevated parking facilities, hereinafter referred to as "Deck Parking". In the event Lessor so elects, Lessee shall pay its proportionate share of the capital expense of providing such Deck Parking. Lessee's proportionate share shall be determined by (a) multiplying the total capital expense of providing such Deck Parking by a fraction, the numerator of which shall be the Floor Area of the Demised Premises and the denominator of which shall be the total rentable building space in Lessor's Parcel, either existing, or proposed by Lessor, as the case may be, at the time of providing such Deck Parking; and (b) multiplying the figure derived as aforesaid by a fraction, the numerator of which is the number of full calendar months remaining in the term of this Lease, and the denominator of which shall be the number of months required to amortize the permanent financing obtained by Lessor to finance the capital expense of providing such Deck Parking. Lessee shall pay its proportionate share of the capital expense of providing such

Deck Parking in equal monthly installments on the first day of every calendar month during the remaining term hereof, plus interest thereon at the rate of nine percent (9%) per annum.

* * *

ARTICLE XXXIV—Relationship of Parties

Nothing contained in this Lease shall be deemed or construed by the parties hereto or by any third party to create the relationship of principal and agent or of partnership or of joint venture or of any association whatsoever between Lessor and Lessee, it being expressly understood and agreed that neither the computation of rent nor any other provisions contained in this Lease nor any act or acts of the parties hereto shall be deemed to create any relationship between Lessor and Lessee other than the relationship of landlord and tenant.

* * *

EXHIBIT "A"

ALTAMONTE MALL

Construction Exhibit For Shell & Allowance Lease In A Two Story Structure (Upper & Lower Levels).

Description of Landlord (Lessor's and/or Developer) and Tenant (Lessee's) work as follows:

PART I—LANDLORD'S WORK DONE AT LANDLORD'S EXPENSE

A. *STRUCTURE*: The Landlord will provide a multi-level shell structure constructed in accordance with local building codes.

1. *LOWER LEVEL FLOOR*: Slab on grade, hard troweled finished concrete surface. The Tenant should pay close attention to "open" floor slab areas indicated on Landlord's Blockout Plan of leased

area. These "open" areas were provided by Landlord so that Tenant may complete the toilet installation according to local code requirements. Dowels and keyway shall be provided in these "open" areas by Landlord. (See Page 5 of Exhibit "A")

2. **UPPER LEVEL FLOOR:** Consists of structural framing system and concrete fill with hard troweled finished concrete surface. (See Page 5 of Exhibit "A")
3. **COLUMNS:** Both upper and lower levels, unprimed structural steel shapes.
4. **OVERHEAD STRUCTURE:** Certain areas of the upper level and roof structures have been over-designed to facilitate installation of condensing and combination roof top units. These areas are indicated in plan view on Landlord's Blackout Plan. All Tenant Unit locations subject to Landlord's final approval.
5. **ROOF:** Shall be insulated built-up roof of a twenty (20) year bonded type with a .15 U Factor.

B. WALLS AND PARTITIONS:

1. Exterior walls shall be of masonry or such other materials selected by Landlord.
2. Exterior walls of shell construction are exposed when in Tenant areas.
3. Interior walls between tenants and/or between tenant and corridor shall be exposed wood or metal studs or masonry at Landlord's option. Firewalls shall be provided as required by code.
4. A minimum 3'-0" x 7'-0" hollow metal door and frame with Landlord's standard hardware shall be provided at service/exit corridors at locations designated by Landlord.

C. FLOORS: Upper and lower levels, troweled concrete. See PART I—ITEM A—STRUCTURE.

D. CEILINGS: Upper and lower level areas will be left exposed to the structural systems overhead.

E. UTILITIES; VENTILATION AND EXHAUST AIR: If Lessor elects to provide any such utilities, the following utilities shall be located approximately 6" within the demised premises at locations designated by Landlord:

1. Domestic water
2. Sprinkler supply line
3. Sanitary sewer (below floor for upper level tenants)
4. Electricity (empty conduit only)
5. Telephone (empty conduit only)
6. Fresh air ductwork for ventilation shall be supplied to lower level tenant spaces to satisfy a maximum rate equal to 0.1 cfm/square foot. Ductwork for fresh air supply shall be within the tenant space or within the adjoining service/exit corridors. Location and method of supplying fresh air will be determined by Landlord.
7. Exhaust air ductwork will be available for each lower level tenant space to satisfy a maximum exhaust rate of 0.1 cfm/square foot. Ductwork shall be within the tenant space or within the adjoining service/exit corridors. Location and method of exhausting air will be determined by Landlord.

PART II— TENANT'S WORK DONE AT TENANT'S EXPENSE

The Tenant's work shall conform to all applicable governing codes and shall include, but not be limited to the following:

Tenant to construct and equip the demised premises in accordance with the following, the requirements of the Tenant Handbook, and complete plans and specifications approved in writing by the Landlord prior to commencement of said construction as provided for in this Lease. The Tenant must follow the provisions of the Landlord's Tenant Handbook in the submission of preliminary and complete construction plans to the Landlord. Tenant Handbook will be supplied to Tenant with Landlord's Blockout Plan.

A. STRUCTURE:

1. **LOWER LEVEL FLOOR:** Should Tenant desire to locate toilet in areas other than that designated, the Tenant shall fill in the "open" area and remove existing concrete and replace with minimum 4" thick, 3000 psi concrete—23 day—reinforced with #3 bars #12" c/o each way. Any cutting and patching of this lower level slab requires written approval by Landlord before Tenant begins work.
2. **UPPER LEVEL FLOOR:** System is designed to support a total allowable live load (including partitions) of 95 pounds per square foot. No allowance shall be made for reductions allowed by code. The Tenant is required to make all floor penetrations to facilitate his installations. All upper floor penetrations must be clearly shown on Tenant's plans for Landlord's approval. All Floor penetrations shall be completely filled-in to seal the floor to prevent odors or liquid from penetrating the floor.
3. **OVERHEAD STRUCTURE:** Should the over-designed areas provided by Landlord not satisfy Tenant's requirements, structural modifications can be made at Tenant's expense, subject to Landlord's approval. Lower level Tenants are allowed a mis-

cellaneous loading equivalent to 5 pounds per square foot on the upper level floor system.

4. **ROOF:** All Tenant required penetrations of the roofing system shall be held to a minimum. Tenant shall employ a licensed Roofing Contractor to repair and complete all penetrations of the roofing system. Tenant shall provide all openings, reinforcing, curbs, flashings, etc.

B. WALLS AND PARTITIONS:

1. Where masonry does not occur, the Landlord will provide only the studs (wood or metal) for the partitions separating one Tenant from another. Each Tenant must furnish and install 5/8" firerated gypsumboard, taped, bedded, airtight against the deck above, on his side of all common dividing partitions.
2. Walls may or may not coincide with column centerlines; columns being thicker than the walls will extend into the Tenant's areas. All treatments, finishes, or furring desired by Tenant shall be by Tenant at Tenant's expense.
3. No deduction in leased area is allowed for columns.
4. Local codes require all demising partitions to be constructed having a one hour rating. Interior partitions shall be constructed of non-combustible materials in accordance with applicable sections of the code. If non-combustible wood is permitted, all material shall bear the Underwriter's Laboratories stamp indicating material is Treated And Labeled Combustible material of any nature Will Not be permitted above finished ceilings.
5. The storefront area will be left open between the Tenant's common dividing partitions and mall fin-

ished floor to the under side of the common cornice soffit. The Tenant shall be responsible for constructing a complete storefront the full width and height (including corners, if applicable). Swinging doors not permitted to swing beyond building line. No neutral piers are provided.

C. FLOORS:

1. Expansion joints are installed as a necessary function of this structure. These joints do not occur in all Tenant spaces and those spaces in which they occur shall be clearly identified. The expansion joint shall be a complete installation by the Landlord, and it shall be the Tenant's responsibility to install finish floor covering material to this joint in a workmanlike manner.
2. Sanitary cleanouts are installed as a necessary function of the sanitary sewer system. These cleanouts do not occur in all Tenant spaces and those spaces in which they occur shall be clearly identified. The cleanouts shall be a complete installation by the Landlord, and it shall be the Tenant's responsibility to install finish floor covering material to these cleanouts in a workmanlike manner.

D. CEILINGS:

1. All interior finishes beyond the exposed structural systems will be by Tenant at Tenant's expense.
2. Certain pipes, conduits, ducts, and utilities are passing through tenant spaces and are supported by the overhead structure. These items service other Tenants and building areas and are engineered to guarantee the Tenant a minimum ceiling height of 10'-0".

3. In addition to the certain pipes, conduits, ducts, etc. covered under item 2 above, lower level tenants agree and recognize that the upper level tenants will have certain pipes, conduits or other related items located in the ceiling space of the lower level tenants leased space. Lower level tenants further agree and recognize that upper level tenants have the right to install the above mentioned pipes, conduits or other related items from within the lower level tenants space.

The lower level tenant shall cooperate with the upper level tenant for the installation of these items. In the event the lower level tenant's space is "nearing completion", "completed" and/or "opened for business", the upper level tenant shall simplify his installation problems by "initial design", "re-design" or install his items at the hours and times as he and the lower level tenant can agree on.

In the event the tenants cannot agree to a reasonable solution, Landlord shall arbitrate and the Landlord's judgment shall be final.

4. All pipes, conduits and other related items that upper level tenants install in the ceiling space of the lower level tenants shall be run tight to the structural steel members in order to provide the lower level tenant maximum working space for the installation of his pipes, conduits, ducts, ceilings and/or other related items.

Exception to items run tight to the structural steel would be pipes or lines required to slope by code or function. In this event, upper level tenants shall, where possible, confine these lines to follow the line of the lower level tenants dividing partitions.

E. UTILITIES, FRESH AIR, EXHAUST AIR:

1. Connections to the following utilities, including meters, equipment, hook-up and extensions to make a complete, approved and operating system:
 - a. Domestic water
 - b. Sprinkler supply line
 - c. Sanitary sewer
 - d. Electric
 - e. Telephone
2. Lower level tenants shall connect to the fresh air ductwork at location provided by Landlord. Required external static pressure of Tenant's air-conditioning unit must be increased a minimum of 0.2" w.g. to facilitate utilization of the fresh air ductwork.
3. Lower level tenants shall connect to the exhaust system ductwork at location provided by Landlord. Required external static pressure of tenants exhaust fan must be increased a minimum of 0.25" w.g. to facilitate utilization of exhaust ductwork.
4. Food service operations located on lower level can connect only toilet room exhaust systems to the exhaust system provided. However, exhaust and make-up air systems from kitchen, preparation, and other special exhaust systems shall be extended vertically thru the roof at a location designated by Landlord.
5. Beauty salons, pet shops or any other areas on lower level which require special exhaust and make-up air systems shall be responsible for providing all necessary equipment and materials to accommodate these systems. These special exhaust systems will not be

permitted to connect to exhaust ductwork provided by Landlord but must be extended thru roof. System design subject to approval of Landlord.

6. Penetrating exterior walls for mechanical equipment will not be permitted.
7. Upper level tenants shall satisfy fresh air and exhaust requirements by carrying their systems thru the roof and terminating them with appropriate devices to satisfy design requirements. Roof penetrations shall be kept to a minimum.
8. Lower level tenants must run sanitary sewer vents to the vent stub provided by Landlord within leased space. Upper level tenants will extend vent(s) from their plumbing and thru roof as required.

F. HEATING, VENTILATING AND AIR-CONDITIONING:

1. Tenant shall design the heating, ventilating and air-conditioning system in accordance with the following minimum design requirements:
 - a. Cooling calculations shall be based on maintaining 78°F dry bulb and 50% relative humidity inside with Ashrae design conditions (2½% column) outside. Internal loads shall be based on actual light loads, equipment loads (if any) and minimum occupancy of 50 square foot per person based on aggregate leased area or actual seating capacity, whichever is larger. Outside air load shall be based on o.l. cfm/square foot or total exhaust air, whichever is larger.
 - b. Heating calculations shall be based on maintaining 70°F dry bulb inside with Ashrae design condition (99% column) outside.

2. Air Distribution System:

- a. The Tenant shall provide a complete air-conditioning system in tenant's space. Two types of systems shall be furnished depending on the tenant's location in the center. One system will consist of a fan and coil air handling unit complete with matching condensing unit, piping, automatic temperature controls, supply, return and outside air duct-work with required grilles, registers, diffusers, and fire dampers when required. The other type of system used shall be a roof mounted package unit complete with automatic temperature controls, supply, return and outside air ductwork with required grilles, registers, diffusers and fire dampers when required. The type of system to be utilized shall be as follows:
 1. Lower Level—Fan—Coil
 2. Upper Level—Fan—Coil or roof top package
- b. Fan and coil units shall be located in an accessible manner in the tenant's space. Units shall be suspended from the structural steel in ceiling space within practical physical limits. Larger units shall be floor mounted when suspension is impractical or when weight dictates.
- c. Roof mounted equipment (package and condensing units) shall be located over extra steel provided by Landlord (unless otherwise designated).
- d. Roof mounted equipment (package and condensing units) shall be located on prefabricated unit curbs or equipment supports. Mounting systems requiring roof penetrations or wood runners will not be permitted.

- e. Show windows shall be air-conditioned or ventilated.
- G. **PLUMBING:** All plumbing and fixtures including a minimum six (6) gallon water heater for toilet rooms.
- H. **TOILET FACILITIES:** Complete toilet rooms separate for each sex shall be provided, equipped with a floor drain and all required fixtures, partitions, floor and wall finishes, ventilation, etc. In the event that the occupancy requires only one toilet room, rough-in provisions shall be made for the second toilet room.
- I. **SPRINKLER SYSTEM:** Complete sprinkler system including all branch lines, heads, etc. System subject to Landlord's, Landlord's Insurance Company and State Rating Bureau approval.
- J. **ELECTRIC EQUIPMENT:** All light fixtures, meters, wiring, service, lamps and equipment including installation, hook-up and support. Lighting fixtures with exposed fluorescent tubes not permitted in sales areas or areas accessible to the public.
- K. **TELEPHONE EQUIPMENT:** All conduits for telephone wires. Tenants shall make all necessary arrangements with telephone company for service.
- L. **SPECIAL EQUIPMENT:** Alarm systems or other protective devices; public address system; fire extinguishers; conveyors; elevators; escalators; dumb waiters; timeclocks; delivery door buzzers; storm and screen doors; storm enclosures; dry chemical fire protection systems; pilot light for heating, ventilating and air-conditioning equipment, etc.
- M. **ROOF OPENINGS:** All roof openings, reinforcing, curbs, flashing, etc. for heating, ventilating, air-conditioning, plumbing and electrical equipment.
- N. **SIGNS:** Shall be in accordance with Landlord's sign restrictions.

- O. **FIXTURES:** All store fixtures, cases, paneling, cornices, etc..
- P. Tenant agrees that only Union Labor affiliated with the A.F.L./C.I.O. Building Trades will be used in performance of Tenant's work.
- Q. Tenant and/or his contractor and/or subcontractors to obtain and pay for all permits and comply with all building codes, ordinances, O.S.H.A. regulations, regulations and requirements of Fire Insurance Rating Bureau. Landlord's approval of plans does not release Tenant from this obligation.
- R. Tenant agrees to require his contractor and/or subcontractors to furnish Landlord evidence of adequate insurance coverage prior to Tenant's contractors performing any work in Tenant's premises, and Tenant agrees to indemnify and hold harmless Landlord from and against any claims, actions or damages resulting from acts or neglects of Tenant, his agents, employees, contractors or subcontractors in the performance of Tenant's work.
- S. Tenant and/or his contractors and/or subcontractors are limited to performing their work including any office or storage for construction purposes within the demised premises only. Tenant and/or his contractors and/or subcontractors shall each be responsible for daily removal from the project of all trash, rubbish and surplus materials resulting from construction, fixturing and merchandising of the demised premises. The Tenant is cautioned against having trash accumulated within his space. Should this develop, Landlord's Project Manager will remove Tenants, and Tenant's contractors trash and the charge will be 1.5 times Landlord's cost.

- T. Tenant and/or his contractors and/or subcontractors are responsible for temporary utilities for their work including payment of utility charges.
Landlord has made provision for temporary electric within the Mall, Tenant and/or his contractors may avail themselves of this temporary service under the following conditions:
 1. That service is available only during Landlord's working hours.
 2. That termination of this service is at Landlord's sole election.
 3. Service charge is \$100.00 per month.
 4. One store—One hook-up.
 5. If Landlord does not elect to provide service from said temporary, Tenant must make his own arrangement for same.
- U. Upon approval by Landlord of Tenant's working plans, Tenant shall cause construction to promptly commence and will use every effort to cause the demised premises to be completed in time for the Grand Opening date of the project unless otherwise dictated by lease.
- V. Landlord will require Tenant to erect temporary barricades to close off the demised premises from the mall until Tenant's heating and air-conditioning system is operative; or, to screen Tenant's premises from public view during construction if the mall is open to the public. Said temporary barricade or screen to be constructed and painted in accordance with Landlord's plans that are in the possession of the Resident Project Manager.
- W. The Tenant and/or his contractor must present to the Landlord's Project Manager at the project one (1) complete set of working drawings and specifications approved by the Landlord and applicable governing authorities before permission will be given to start construction in the demised premises.

PART I—A1 (Cont'd)

Floor slabs for this project will be placed on a continuing and sequential basis as scheduled with *all* slab work for the entire project being completed well in advance of the center opening. Wherever possible, forty-five (45) days written notice will be given to each lower level tenant by Landlord prior to placing the concrete slab to permit installation of electrical floor boxes, conduits, piping and other related items. These items must be set in place within this forty-five (45) day period.

If the lower level Tenant is unable to complete this installation within this period, the slab will be placed regardless. The Tenant, at his own expense, will then be required to cut and channel the slab as necessary, install his electrical floor boxes, conduits, piping and other related items and repair the slab to accept his floor covering material.

PART I—A2 (Cont'd)

This structural floor of composite design will be placed prior to Tenant starting construction. Depressions in the slab for carpeting, terrazzo, etc. can not be permitted. Electrical floor boxes must be installed by core drilling through the concrete slab to the lower level tenant's ceiling space. No piping, conduits and other related items will be permitted to be placed in the concrete slab or on the steel decking.

Conduit for electrical floor boxes, piping and other related items must be run tight to the structural in the lower level tenant's ceiling space; refer to Part II-D Ceilings of the lease exhibit.

JOINT EXHIBIT 2

**LEASE
BY AND BETWEEN
EASTLAKE SQUARE ASSOCIATES
and
H. J. WILSON CO., INC.**

TABLE OF CONTENTS

	<u>PAGE</u>
ARTICLE I	1
ARTICLE II	2
ARTICLE III	2
ARTICLE IV	6
ARTICLE V	9
ARTICLE VI	12
ARTICLE VII	14
ARTICLE VIII	18
ARTICLE IX	19
ARTICLE X	21
ARTICLE XI	22
ARTICLE XII	25
ARTICLE XIII	27
ARTICLE XIV	28
ARTICLE XV	29
ARTICLE XVI	29
ARTICLE XVII	32
ARTICLE XVIII	35
ARTICLE XIX	37
ARTICLE XX	40
ARTICLE XXI	40
PREMISES—OPERATING AGREEMENT	1
TERM	2
RENT	2
TAXES AND OTHER CHARGES	6
ASSIGNMENT AND SUBLETTING	9
USE OF DEMISED PREMISES AND OPERATING COVENANTS	12
LEASEHOLD FINANCING BY TENANT	14
MAINTENANCE AND REPAIRS—ALTERATIONS	18
INDEMNITY AND PUBLIC LIABILITY INSURANCE	19
OTHER INSURANCE	21
DAMAGE AND DESTRUCTION	22
CONDEMNATION	25
COMPLIANCE	27
MECHANICS' LIENS	28
LANDLORD'S ACCESS TO PREMISES	29
EASEMENTS	29
DEFAULT BY TENANT	32
MISCELLANEOUS	35
LANDLORD'S ESTATE	37
SUBORDINATION OF LEASEHOLD	40
COMMENCEMENT OF TENANT'S CONSTRUCTION, OPENING AND RENT COMMENCEMENT	40

		<u>PAGE</u>
ARTICLE XXII	CONSTRUCTION OF TENANT'S IMPROVEMENTS	41
ARTICLE XXIII	SUBJECT CLAUSE AND REPRESENTATION	42
ARTICLE XXIV	MERCHANTS' ASSOCIATION	42
ARTICLE XXV	SIGNS	43
ARTICLE XXVI	SURRENDER OF DEMISED PREMISES	43
ARTICLE XXVII	LANDLORD'S WAIVER OF LIEN RIGHTS	44

EXHIBITS

EXHIBIT "A"	LEGAL DESCRIPTION OF "DEMISED PREMISES"
EXHIBIT "B"	SITE PLAN
EXHIBIT "C"	LEGAL DESCRIPTION OF "SHOPPING CENTER SITE"
EXHIBIT "D"	LEGAL DESCRIPTION OF "DEVELOPER SITE"
EXHIBIT "E"	BUILDING IMPROVEMENTS BY TENANT ON DEMISED PREMISES AND DEVELOPER SITE
EXHIBIT "F"	TITLE EXCEPTIONS

LEASE

THIS LEASE, made as of the 7th day of August, 1979, by and between EASTLAKE SQUARE ASSOCIATES, a Florida General Partnership composed of Eastlake Square, Inc., a Florida corporation, having its principal office at 7620 Market Street, Youngstown, Ohio 44512, and JCP Realty, Inc., a Delaware corporation, having its principal office at 1301 Avenue of the Americas, New York, New York 10019 ("Landlord"), and H. J. WILSON CO., INC., a Louisiana corporation, having its principal office at 5825 Florida Boulevard, Baton Rouge, Louisiana 70896 ("Tenant");

. . .

ARTICLE III RENT

Section 1. Commencing with the date as provided in Article XXI, Tenant shall pay to Landlord minimum rent ("Minimum Rent") per annum in the amount of Fifty Thousand and 00/100 Dollars (\$50,000.00), payable in equal monthly installments of Four Thousand One Hundred Sixty-six and 67/100 Dollars (\$4,166.67) in advance on or before the first day of each calendar month after such date. If Minimum Rent shall be payable for a fraction of a calendar month, it shall be prorated for that month on a daily basis.

Section 2. In addition to Minimum Rent, Tenant shall pay to Landlord, as percentage rent ("Percentage Rent") for each Lease Year (as defined in Section 3 of this Article III) a sum equal to one per cent (1%) of the amount by which Adjusted Gross Sales (as defined in Section 4 of this Article III) in such Lease Year shall have exceeded the product of One Hundred and 00/100 Dollars (\$100.00) times the Floor Area (as defined in Section 3 of this Article III) of the structure to be constructed by Tenant hereunder ("Percentage Rent Base"). In the event any Lease Year is less than a full twelve (12) month period ("Partial Lease Year"), Tenant shall pay Percentage Rent for such period, computed as above provided, except that the Percentage Rent Base shall be reduced to a figure obtained by multiplying the Percentage Rent Base by a fraction, the numerator of which shall be the number of days contained in such Partial Lease Year and the denominator of which shall be three hundred sixty-five (365). In the event that the Improvements shall be completely or substantially closed to business with the public for any period of time for any reason other than regularly scheduled daily or weekly closing periods, Percentage Rent Base for the Lease Year in which such closing shall have taken place shall be reduced or abated in the same manner as for a Partial Lease Year.

. . .

Section 4. "Adjusted Gross Sales", as such term is used herein, shall mean the total amount of gross sales, income, receipts, revenues and charges of, in connection with and for all merchandise, services or other operations or business sold or rendered at, in, on, or from the Demised Premises and Improvements by Tenant or by any subtenants, licensees or concessionaires (whether or not such entities are permitted under the terms of this Lease), whether for cash or on a charge, credit or time basis, without reserve or deduction for inability or failure to collect, and including, but not limited to, sales and services (a) where orders originate and/or are accepted by Tenant on the Demised Premises but delivery or performance thereof is made from or at any place other than the Demised Premises; (b) pursuant to mail, telegraph, telephone or other similar orders received or filled at or in the Demised Premises; (c) by means of mechanical and other vending machines in the Demised Premises, except those used primarily by employees; (d) which Tenant in the normal and customary course of business would credit or attribute to its business upon the Demised Premises or any part or parts thereof. All of the foregoing shall be adjusted by the deduction, if originally included in gross sales, or exclusion, as the case may be, from gross sales of the following, to the extent that separate records are maintained for such deductions or exclusions: (a) amounts of refunds and allowances made on merchandise claimed to be defective or unsatisfactory, provided that if such refunds or allowances are in the form of credits to customers, such credits shall be included in gross sales when used; (b) exchanges of merchandise between stores of Tenant where such exchanges are made solely for the operation of Tenant's business and not for the purpose of consummating a sale which has been made at, in, on, or from the Demised Premises and/or for the purpose of depriving Landlord of the benefit of such sale which otherwise would have been made at, in, on, or from the

Demised Premises; (c) returns to shippers and manufacturers for credit; (d) sales of trade fixtures or store operating equipment after use thereof in the regular conduct of Tenant's business in the Demised Premises; (e) sums and credits received in settlement of claims for loss or damage to merchandise; (f) amounts of any excise or sales tax levied upon retail sales and payable over to the appropriate governmental authority provided that specific record is made at the time of each sale of the amount of tax, and the amount thereof is expressly charged to the customer; (g) bad debts, including credit card charge-backs not later credited and uncollected checks not later collected, not in excess of one per cent (1%) of Tenant's total sales; (h) interest received on customer charge accounts; and (i) actual credit card company service charges, but not in excess of the greater of three per cent (3%) or one-half (1/2) of the actual credit card company service charge.

. . .

ARTICLE IV

TAXES AND OTHER CHARGES

Section 1. Tenant shall pay and discharge punctually as and when the same shall become due and payable, all taxes and assessments, water rents, sewer rents and charges, duties, impositions, license and permit fees, charges for public utilities of any kind, payments and other charges of every kind and nature whatsoever, ordinary and extraordinary, foreseen or unforeseen, general or special, in said categories, together with any interest or penalties lawfully imposed upon the late payment thereof, which, pursuant to present or future law or otherwise, during the term hereby granted shall have been or shall be levied, charged, assessed, imposed upon or grow or become due and payable out of or for or have become a lien on the Demised Premises or any part thereof, the Improvements and the property therein and the appurtenances thereto, the

rents received by Landlord from the Demised Premises or any use of the Demised Premises and such franchises as may be appurtenant to the use and occupation of the Demised Premises. All the items referred to in this Section 1 are sometimes and hereinafter called "Impositions".

* * *

Section 5. Tenant's Contribution to Impositions for Improvements on the Demised Premises.

* * *

B. If Tenant's Improvements are not separately assessed or if the Impositions applicable thereto cannot be determined from an examination of the tax assessor's records, Landlord shall pay all Impositions to the taxing authority, and Tenant shall reimburse Landlord for its allocable portion determined pursuant to this Section, of the Impositions for any tax year or portion thereof during the period in which Tenant is obligated for the payment of Impositions applicable to its Improvements, within twenty (20) days after Tenant shall have received copies of the tax bills from Landlord with an itemized statement of the allocation to Tenant of Impositions applicable to Tenant's Improvements.

Tenant shall use all reasonable efforts to have Tenant's Improvements separately assessed. In the event that Tenant's Improvements are not separately assessed, but are assessed as part of the Developer Site and the Impositions applicable to Tenant's Improvements cannot be determined from an examination of the tax assessor's records, to both parties' satisfaction as set forth above, the Impositions applicable to Tenant's Improvements shall mean the Impositions assessed with respect to any tax year (during the period in which Tenant is obligated to pay Impositions) against the buildings and improvements located on the Developer Site multiplied by a fraction, the numerator of which shall be the number of square feet of Floor

Area located within the Demised Premises and the denominator of which shall be the average number of square feet of Floor Area during such calendar year in all of the buildings and improvements so assessed which are located on the Developer Site. The allocation formula provided for herein shall not take effect until the first year in which Tenant's Improvements are fully assessed; prior to such time, Tenant shall reimburse Landlord for Impositions applicable to its Improvements as then partially completed, if any.

* * *

ARTICLE V

ASSIGNMENT AND SUBLETTING

Section 1. Except as provided in Section 2 and Section 3 of this Article V, Tenant shall not, voluntarily, involuntarily or by operation of law, sell, mortgage, pledge or in any manner transfer or assign this Lease, in whole or in part, or sublet the whole or any part of the Demised Premises, or permit any other person to occupy same without the consent of Landlord, references elsewhere herein to assignees, subtenants, licensees or other persons notwithstanding, and any of the foregoing shall be of no force or effect. In the event that Tenant requests permission to assign this Lease, sublet the whole or any part of the Demised Premises or to do anything referred to in the immediately preceding sentence, then Landlord may, in its sole and absolute discretion, elect to consent or withhold consent. Subject to Tenant's operating covenant, Tenant shall have the right to sublease any portion of the Demised Premises or to license concessions therein, not to exceed 15,000 square feet, without Landlord's consent. Except as provided in Section 2 of this Article V, any assignment or subletting, even with consent of Landlord, shall not relieve Tenant from liability for payment of rent and other sums herein provided or from the obligation to keep and be bound by all the terms, conditions and

covenants of this Lease. The acceptance of rent from any other person shall not be deemed to be a waiver of any of the provisions of this Lease, a consent to the assignment of this Lease or a subletting of the Demised Premises. The prohibitions and other provisions of this Section 1 of this Article V shall also be applicable with respect to a lease of the Improvements or any part thereof.

Section 2. Subsequent to the period of fifteen (15) years after the Wilson store opens for business in the shopping center ("Initial Operating Period"), Tenant may assign this Lease or sublet the whole of the Demised Premises to any entity ("Permissible Entity") which shall, at the time of the assignment or sublease, meet both of the following requirements:

- (a) have a net worth in excess of Twenty Million Dollars (\$20,000,000.00); and
- (b) operate eight (8) or more Department Stores (as herein defined) in the continental United States. As used in this subparagraph (b), the term "Department Store" shall mean a retail store containing a number of departments for the sale of hard and soft goods and miscellaneous merchandise and such services as are customarily sold and performed by department stores from time to time, including a general line of apparel and housewares, whether or not a full-line of each category is carried, or a catalog store similar to the type to be operated under this Lease by H. J. Wilson Co., Inc.

Tenant shall have the right, without the necessity of obtaining Landlord's consent, to assign this Lease or sublet the Premises to any wholly owned or affiliated or parent corporation, but in the case of an assignment, the original Tenant shall continue as guarantor of Tenant's obligations hereunder. If there shall be an assignment of this Lease or subletting of the Demised

Premises to any wholly owned or affiliated corporation and thereafter as a result of one or more assignments, sales or transfers of the shares of stock of such previously wholly owned or affiliated corporation, H. J. Wilson Co., Inc. does not thereafter own in excess of fifty per cent (50%) of both the voting shares and more than twenty-five per cent (25%) of all shares, the assignments, sales or transfers of those shares which were in excess of the number required to retain controlling interest by H. J. Wilson Co., Inc. shall be deemed to be void and of no force and effect. Notwithstanding the provisions of the immediately preceding sentence, more than fifty per cent (50%) of the voting shares and more than twenty-five per cent (25%) of all shares of stock of any previously wholly owned or affiliated corporation may be owned by either of the following:

- (a) a Permissible Entity; or
- (b) an entity which shall acquire all of the stock of every corporation operating all of the retail stores of H. J. Wilson Co., Inc., its subsidiaries and affiliates in the State of Florida, but in no event less than four (4) such stores.

In addition to the foregoing, H. J. Wilson Co., Inc. shall have the right to assign this Lease in the event of a merger or a consolidation with another corporation, or in the event of a sale or transfer of all or substantially all of said company's assets without the necessity of obtaining Landlord's prior consent; provided the acquiring or surviving corporation has a net worth at least equal to the greater of (i) Tenant's net worth as of the date of execution of this Lease, or (ii) Tenant's net worth as of the date immediately prior to such assignment. Tenant agrees that it shall notify Landlord of its intention so to do and shall deliver a satisfactory assumption of Tenant's liabilities by such assignee, whereupon Tenant's liability hereunder (except for acts in default occurring prior to such assumption) shall terminate. The prohibitions and limitations upon assignment

and/or subletting of this Lease and the operating covenant of Tenant under Article VI, Section 2, shall not apply to any person, firm or corporation who has succeeded to the interest of Tenant under this Lease by foreclosure or deed in lieu of foreclosure (dation en paiement) or to any assignee of this Lease in connection with an assignment and leaseback or sublease to H. J. Wilson Co., Inc. or an affiliate or subsidiary in the event Tenant's possessory interest shall terminate by reason of a default under the terms of such leaseback or sublease or to the assignees of such person, firm or corporation, except the entire building must be used only for a single store engaged in retail merchandising to the general public.

Section 3. Anything in this Lease to the contrary notwithstanding, Tenant may assign or transfer its interest in this Lease and/or the Improvements, provided it shall simultaneously become vested with a subleasehold estate or similar possessory interest in the Demised Premises by virtue of a sublease made by the assignee, or if, in order to secure an indebtedness, Tenant shall mortgage its leasehold estate and retain a possessory interest in the Demised Premises, in which event the assignee of this Lease or the trustee, beneficiary or mortgagee under any such deed of trust or mortgage shall not be deemed to have assumed or be bound by any of Tenant's obligations hereunder for so long as Tenant shall retain a possessory interest and all obligations shall continue to remain those of Tenant alone. So long as Tenant retains such possessory interest, performance by Tenant of any act required to be performed under this Lease by it or fulfillment of any condition of this Lease by Tenant shall be deemed the performance of such act or the fulfillment of such condition by such assignee, trustee, beneficiary or mortgagee, as the case may be, and shall be acceptable to Landlord with the same force and effect as if performed or fulfilled by such assignee, trustee, beneficiary or mortgagee, as the case may be. Anything in this Lease to the contrary notwithstanding, if any mortgage of the leasehold or

the Improvements is foreclosed or deed delivered in lieu of foreclosure, or if Tenant, having entered into an assignment and subleaseback involving the Demised Premises shall be deprived of possession thereof by reason of its failure to comply with the terms of such subleaseback or the leasehold mortgage, anyone who has acquired or shall thereafter acquire title to the Demised Premises or the Improvements shall hold the same free of any requirement of this Lease that a "Wilson's" catalog showroom department store be operated, but Tenant shall not, in such a case, be deemed released from its obligations under Article VI. Notwithstanding any assignment, nothing contained in this Section 3 or Section 2 (except in the case of a merger or consolidation) shall be deemed to release H. J. Wilson Co., Inc. from liability for the obligations of Tenant. If any mortgage of the leasehold or Improvements is foreclosed or deed delivered in lieu of foreclosure, or if Tenant, having entered into an assignment and subleaseback involving the Demised Premises shall be deprived of possession thereof by reason of its failure to comply with the terms of such leaseback or the leasehold mortgage, any person, firm or corporation succeeding to the possessory interest of Tenant in the Demised Premises shall not be obligated to undertake or perform any duties, obligations or responsibilities of any kind or nature imposed upon Tenant which accrued prior to the date such person, firm or corporation succeeds to such possessory interest, and shall be liable for such duties, obligations and responsibilities of Tenant only so long as such person, firm or corporation retains a possessory interest in the Demised Premises.

ARTICLE VI

USE OF DEMISED PREMISES AND OPERATING COVENANTS

Section 1. Landlord agrees with Tenant that until Tenant is in breach of any of the terms and conditions imposed upon Tenant under this Lease, subject to the provisions of the Operating Agreement, Landlord will comply with any obligation imposed upon Landlord under the provisions of Section 16.1 of the Operating Agreement.

Section 2. Provided, (i) Landlord is not in default of its operating covenant under Section 16.1 of the Operating Agreement, and (ii) any two (2) of J. C. Penney Company, Inc., Montgomery Ward Development Corporation and Belk-Lindsey of Tampa, Florida, are operating department stores in their premises under their respective names, Tenant agrees, for all of the Initial Operating Period, as that term is defined in Article V, Section 2, to operate a typical Wilson's store, having in excess of 50,000 square feet of Floor Area, under the trade name "Wilson's", or such other trade name as is employed by the majority of the catalog showroom department stores operated by H. J. Wilson Co., Inc. and its subsidiary or affiliated corporations in the State of Florida. During the balance of the term, Tenant shall operate or cause to be operated (to the extent permitted by the provisions of Article V) a department store (but not under any specific name) in the Demised Premises containing a customer mall entrance on both levels, vertical transportation within the Demised Premises and not less than 3,000 square feet of retail sales area on the upper level.

Notwithstanding the foregoing, a department store need not be operated during such time as either of the following shall occur subsequent to the Initial Operating Period:

- (a) less than two (2) department stores shall be operated on the respective premises now operated by Mont-

gomery Ward Development Corporation, J. C. Penney Company, Inc. and Belk-Lindsey Company of Tampa, Florida, for any reason other than "Force Majeure"; or

- (b) less than fifty per cent (50%) of the gross leasable area of the mall shops shall be open for business to the public for a period in excess of six (6) months after specific notice from Tenant to Landlord.

At no time during the term hereof may the Demised Premises be used for other than retail and related purposes.

Section 3. From and after the day on which Tenant shall open for business and throughout the entire balance of the term hereof, Tenant shall, in good faith, continuously, actively and diligently maintain, conduct and operate all of the Improvements on two (2) levels, in a high grade and reputable manner, maintaining in the Demised Premises a full staff of employees, and equipment for the protection of the person and property of the general public, and shall expend all necessary, proper and reasonable efforts consistent with good business practice to that end. The words "continuously", "actively" and "diligently", as used herein, shall mean uninterruptedly at least from 10:00 A.M. to 9:30 P.M. on Monday through Saturday, provided that at least two (2) other department stores in the shopping center and fifty per cent (50%) of the mall tenants on the Developer Site are opened for business; and during such hours on Sunday as the aforesaid department stores and mall tenants are operating. Notwithstanding the foregoing, Tenant shall not be required to operate on any Monday following a Sunday holiday. Any temporary cessation of such operation (other than as may be contemplated or permitted under the provisions of this Lease entitled "Condemnation" and "Damage and Destruction", and in Section 13 of Article XVIII defining "Force Majeure"), for any cause incident to the conduct of a retail catalog department store business or the temporary cessation of such operation because of remodeling of or the

making of Improvements to the Wilson store, at any time shall not be considered as a default under this Article, so long as Tenant is using due diligence to resume operation.

Section 4. Tenant shall conduct no auction, fire or bankruptcy sales or similar practice on the Demised Premises and shall display no merchandise outside the Improvements or the Demised Premises nor in any way obstruct the malls or sidewalks adjacent thereto and shall store all trash and refuse in appropriate containers within the Improvements and attend to regular disposal thereof; use or permit to be used any advertising medium that might constitute a nuisance, such as loudspeakers, sound amplifiers, phonographs or radios which can be heard outside of the Demised Premises. Tenant shall not burn any trash or rubbish in or about the Demised Premises or anywhere else within the confines of the shopping center complex. Tenant shall not operate a garbage grinder without Landlord's prior consent, but may operate a trash compactor.

* * *

ARTICLE VIII

MAINTENANCE AND REPAIRS—ALTERATIONS

Section 1. Tenant shall put, keep and maintain in good order and first-class condition the Demised Premises and the Improvements, including, without limitation, the exterior and interior portions of all doors and windows, electrical, plumbing, heating and air conditioning equipment and facilities, and signs of Tenant, wherever located, permitted by this Lease. In addition, Tenant shall promptly make all repairs, interior and exterior, structural and nonstructural, foreseen and unforeseen, latent and patent, ordinary and extraordinary, howsoever the necessity may occur, and of every kind and nature. All repairs shall be equal to the original in class and quality. Tenant shall keep the Demised Premises and the Improvements in a clean, sanitary and safe condition, free of dirt, rubbish, snow and ice

and obstructions and in accordance with the requirements of all public authorities having jurisdiction thereof. "Repairs" shall include replacements, whenever necessary. Landlord shall not be required to make any repair, maintain anything or provide any facility or service, except as specifically provided herein.

Section 2. Tenant shall not make any exterior or structural alterations, improvements and/or additions ("alterations") to the Demised Premises or the Improvements without first obtaining, in each instance, the consent of Landlord. Alterations shall be made in accordance with all applicable laws and in a good and first-class, workmanlike manner.

Section 3. Reference is hereby made to those portions of Sections 8.1 and 8.2 of the Operating Agreement requiring Landlord (as Developer therein) to perform maintenance work with respect to the Enclosed Mall and the Common Areas (which terms, as used in this Lease, shall have the same respective meanings as in the Operating Agreement). In consideration of Landlord performing such maintenance work, Tenant shall pay to Landlord, commencing on the date Minimum Rent commences, a sum, for each Lease Year of the term hereof, of Fifty Cents (\$.50) for each square foot of Floor Area within the Improvements during the first five (5) Lease Years. Such annual sum shall be increased by Ten Cents (\$.10) for each such square foot at the end of each period of five (5) years thereafter. The payment for any Partial Lease Year shall be prorated on a daily basis. Such sums shall be payable in equal monthly installments in advance on or before the first day of each calendar month. In the event that Landlord fails to maintain the Enclosed Mall and Common Areas on the Developer Site in accordance with the above requirements, Tenant shall be entitled, at its sole option, after thirty (30) days notice to Landlord, to perform such maintenance in whole or in part and to deduct the cost thereof from its maintenance contribution and from any Percentage Rent which may be due or become due Landlord.

ARTICLE IX

INDEMNITY AND PUBLIC LIABILITY INSURANCE

Section 1. Tenant shall pay and protect, defend, indemnify and save harmless Landlord from and against all liabilities, damages, costs, expenses (including any and all attorney's fees and expenses of Tenant and Landlord), fines, penalties, causes of action, suits, claims, demands and judgments, which may be imposed upon or incurred by or asserted against Landlord and/or against the Demised Premises by reason of any of the following occurring during the term of this Lease, except if and to the extent the same may arise from the negligence of Landlord or any of its agents, contractors, servants, employees or licensees: (i) any work or thing done in, on or about the Demised Premises or the Improvements; (ii) any use, possession, occupation, condition, operation, maintenance or management of the Demised Premises or the Improvements or any part thereof; (iii) any negligence or other wrongful act or omission on the part of Tenant or any of its agents, contractors, servants, employees, licensees or invitees; (iv) any accident, injury or damage to any person or property occurring in, on or about the Demised Premises or the Improvements or any part thereof; and (v) Tenant's violation of any agreement or condition of this Lease and/or of statutes, laws, ordinances or governmental regulations affecting the Demised Premises, the Improvements or the ownership, occupancy or use of them. Tenant is and shall be in exclusive control and possession of the Demised Premises and the Improvements as provided herein and Landlord shall not in any event whatsoever (except for negligence of Landlord, its agents, contractors, servants, employees or licensees) be liable for any injury or damage to any property or to any person happening on or about the Demised Premises or the Improvements or for any injury or damage to any property of Tenant, or of any other person contained therein. The provisions hereof permitting Landlord to enter and inspect the Demised Premises and the Improvements are made for the purpose of enabling Landlord to be informed as to whether

Tenant is complying with the agreements, terms, covenants and conditions hereof, and to do such acts as Tenant shall fail to do.

• • •

ARTICLE XVIII

MISCELLANEOUS

• • •

Section 14. Title to the Wilson store and all other Improvements to be erected by Tenant on the Demised Premises (except any part of the Enclosed Mall thereon) shall be and remain in Tenant during the term of this Lease. Upon the termination of this Lease, whether by expiration of term or otherwise, title to the Wilson store and all other Improvements erected by Tenant shall be automatically transferred to Landlord without any further act by the parties hereto. However, Tenant, on demand, shall execute such further assurances of title to the Wilson store and all other Improvements erected by Tenant as Landlord may request.

• • •

ARTICLE XXII

CONSTRUCTION OF TENANT'S IMPROVEMENTS

Section 1. Plans and Specifications. Tenant covenants and agrees with Landlord that, pursuant to the provisions of Exhibit "E", it will cause to be designed and constructed upon the Demised Premises the Wilson store with an exterior finish substantially identical to that of the existing mall, and the Improvements enumerated in said Exhibit "E" attached hereto and made a part hereof. Tenant shall obtain and submit to Landlord preliminary design schematics showing the elevations and exterior appearance of the Wilson store no later than

September 15, 1979. Upon approval by Landlord, which approval shall not be unreasonably withheld, Tenant shall promptly, at its own expense, obtain final plans and specifications which shall be substantially in accord with the preliminary design schematics approved by Landlord. Tenant shall have the right to make any changes that may be required to make the Wilson store or any facilities or Improvements in the Wilson store suitable for the use of the building by Tenant as proposed herein, provided that such changes are consistent with the preliminary design schematics. The final plans and specifications for the Wilson store may be submitted in stages to Landlord for approval beginning no later than sixty (60) days following the approval of the preliminary design schematics by Landlord and the last plans shall be submitted to Landlord for approval no later than one hundred twenty (120) days after approval of said design schematics. As used herein, "final plans and specifications" shall mean definite architectural and engineering plans and specifications, including all necessary working drawings and specifications and providing for first-class workmanship and materials in detail sufficient to permit construction in full of the department store building and other facilities and Improvements referred to herein.

Section 2. Landlord's Approval. Landlord shall, within thirty (30) days after the receipt of any plans for approval, give Tenant notice of its approval or disapproval thereof, specifying in the latter event the reasons therefor, which approval shall not be unreasonably withheld. Landlord's failure to give notice of its approval or disapproval within thirty (30) days shall be deemed to constitute its approval. Any reason for disapproval of any plans and specifications shall not be inconsistent with this Lease. Tenant will, within thirty (30) days after receipt of a notice of disapproval, as aforesaid, appropriately amend and modify said plans so as to reflect all changes, modifications and corrections which Landlord requires hereunder and upon completion thereof to the reasonable satisfaction of Landlord, the plans as so amended and modified, shall thereupon be approved in writing by Landlord.

After approval of any such plans no changes may be made therein which affect the exterior design or appearance of the Wilson store or other facilities without Landlord's approval. The Improvements constructed by Tenant on the Demised Premises shall be and remain the property of Tenant during the term of this Lease.

. . .

ARTICLE XXIV

MERCHANTS' ASSOCIATION

Section 1. Commencing with the opening for business of the Wilson store, Tenant agrees to join the Merchants' Association then formed and to remain a member thereof for the period the Wilson store is operating, provided:

- (a) Landlord shall pay at least twenty-five per cent (25%) of the aggregate annual contribution made by all of the members;
- (b) tenants occupying at least seventy-five per cent (75%) of the Floor Area in the shopping center and the other department stores join such Association and pay annual dues;
- (c) Tenant's annual dues shall not, for the first five (5) years of such membership, exceed the number of square feet of Floor Area in the Wilson store at the commencement of such year, multiplied by Five Cents (\$.05). Each succeeding five (5) year period shall provide for a One Cent (\$.01) increase per square foot of Floor Area; and
- (d) Tenant shall not be bound by the acts or omissions of such Association, the only obligation of Tenant with respect to such Association being to pay dues in conformity with immediately preceding clause (c) hereof.

JOINT EXHIBIT 3**PLEASE DON'T SHOP AT EAST LAKE PLEASE
SQUARE MALL**

The FLA. GULF COAST BUILDING TRADES COUNCIL, AFL-CIO is requesting that you do not shop at the stores in the East Lake Square Mall because of The Mall owner-ship's contribution to substandard wages.

The Wilson's Department Store under construction on these premises is being built by contractors who pay sub-standard wages and fringe benefits. In the past, the Mall's owner, The Edward J. DeBartolo Corporation, has supported labor and our local economy by insuring that the Mall and its stores be built by contractors who pay fair wages and fringe benefits. Now, however, and for no apparent reason, the Mall owners have taken a giant step backwards by permitting our standards to be torn down. The payment of substandard wages not only diminishes the working person's ability to purchase with earned, rather than borrowed, dollars, but it also undercuts the wage standard of the entire community. Since low construction wages at this time of inflation means decreased purchasing power, do the owners of East Lake Mall intend to compensate for the decreased purchasing power of workers of the community by encouraging the stores in East Lake Mall to cut their prices and lower their profits?

**CUT-RATE WAGES ARE NOT FAIR UNLESS MER-
CHANDISE PRICES ARE ALSO CUT-RATE.**

We ask for your support in our protest against substandard wages. Please do not patronize the stores in the East Lake Square Mall until the Mall's owner publicly promises that all construction at the Mall will be done

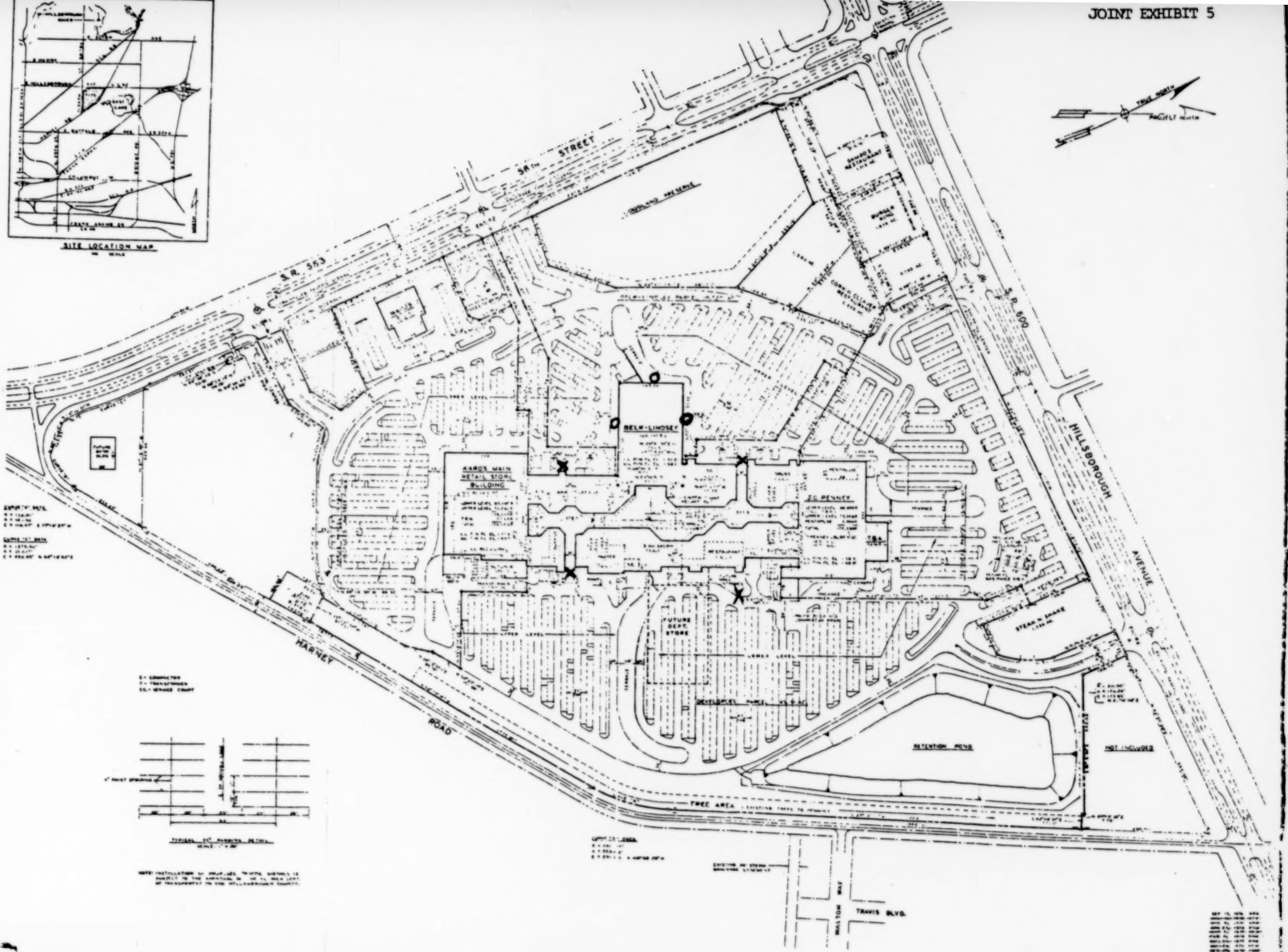
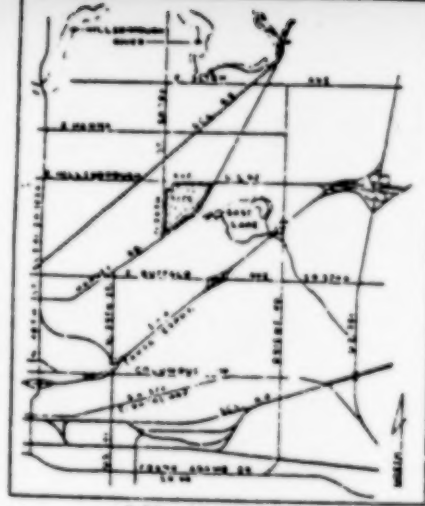
using contractors who pay their employees fair wages and fringe benefits.

IF YOU MUST ENTER THE MALL TO DO BUSINESS, please express to the store managers your concern over substandard wages and your support of our efforts.

We are appealing only to the public - the consumer. We are not seeking to induce any person to cease work or to refuse to make deliveries.

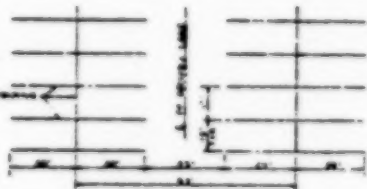
**FLA. GULF COAST BUILDING
TRADES COUNCIL, AFL-CIO**

PLEASE DO NOT LITTER



SYMBOLS:
 1. 12'x12'x12'
 2. 12'x12'x12'
 3. 12'x12'x12'

1. CONCRETE
 2. TRANSFORMER
 3. WIRE CRAFT



TYPICAL CROSS-SECTION DETAILS

NOTE: INSTALLATION OF STRUCTURES, TRAFFIC SIGNALS, IS SUBJECT TO THE DEPARTMENT OF PUBLIC WORKS, CITY OF HOUSTON.

SYMBOLS:
 1. 12'x12'x12'
 2. 12'x12'x12'
 3. 12'x12'x12'

EXISTING 12'x12'x12'

JOINT EXHIBIT 6**Tampa****December 20, 1979**

**Mark F. Kelly, Esquire
341 Plant Avenue
Tampa, Florida 33606**

**RE: Eastlake Square Mall
(Our files 22A, 22B, 22C)**

Dear Mark:

This is to confirm our conversation by telephone covering the distribution of a handbill by your client at the DeBartolo Mall at Eastlake Square. I repeat this position statement I made officially yesterday by telephone.

1. If your client will change the language of the handbill to indicate that its dispute is solely with Wilson's Department Stores, its suppliers, or contractors, and not with DeBartolo or any of the other lessees in the Mall.
2. DeBartolo will take no legal action or oppose peaceful distribution of such changed handbill if restricted to the immediate vicinity of the area of the Wilson's construction site. As I told you by telephone, I will have an attorney from our firm meet with you at the mall to work out an agreement as to where the "immediate vicinity of Wilson's construction site" is.
3. DeBartolo will take no action to restrict handbilling as described in paragraph 1 above, at the places where public roads intersect and lead to the DeBartolo property so long as such handbilling is

peaceful and does not interfere with ingress and egress to and from the mall, or otherwise cause a safety problem.

In making the above statement of position, I do not agree that your client has the right to come on our property under any circumstances. However, our client will not attempt to stop or restrict handbilling which is conducted in the manner and in places described in paragraphs 1, 2, and 3 above.

If you have any questions concerning this matter, please feel free to call me.

Sincerely,

W. Reynolds Allen

WRA:tl

bcc: James M. Blue, Esquire
Mr. Arthur D. Wolfcale
Mr. Augustas C. Rigas

PETITIONER'S

BRIEF

8
No. 86-1461

Supreme Court, U.S.
FILED

AUG 21 1987

JOSEPH F. SPANOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1986

THE EDWARD J. DeBARTOLO CORP.,
Petitioner,

v.

FLORIDA GULF COAST BUILDING
TRADES COUNCIL, AFL-CIO,
and
NATIONAL LABOR RELATIONS BOARD,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER

LAWRENCE M. COHEN
MARTIN K. DENIS
FOX & GROVE, CHARTERED
233 South Wacker Drive
Sears Tower - Suite 7818
Chicago, Illinois 60606
312 / 876-0500

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether it is "fairly possible" to construe the secondary boycott prohibition of the National Labor Relations Act, 29 U.S.C. § 158(b)(4), to encompass only picketing and exclude handbilling and all other forms of labor publicity.

2. Whether, if handbilling and other labor publicity are encompassed by the secondary boycott prohibitions of the Act, those prohibitions contravene the First Amendment to the United States Constitution.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES.....	iv
OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL PROVISION AND STATUTE INVOLVED.....	3
STATEMENT OF THE FACTS.....	4
SUMMARY OF ARGUMENT.....	6
ARGUMENT.....	9
I. THE PROHIBITION OF SECTION 8(b)(4) ENCOMPASSES COERCIVE SECONDARY CONDUCT NOT PROTECTED BY THE PUBLICITY PROVISIO.....	10
A. The Language Of Section 8(b)(4) Encompasses Coercive Secondary Conduct Not Protected By The Publicity Proviso.....	10
B. The Union's Conduct Was Coercive Within The Meaning Of Section 8(b)(4).	14
C. The Legislative History Of Section 8(b)(4) Demonstrates Congress' Intent To Encompass Coercive Secondary Conduct Not Protected By The Publicity Proviso.....	18
II. PROHIBITING COERCIVE SECONDARY CONDUCT DOES NOT CONTRAVENE THE FIRST AMENDMENT.....	24

	Page
A. The Regulation Of Coercive Unprotected Secondary Conduct Imposes No Impermissible Restriction Upon Constitutionally Protected Speech.....	26
B. The Union's Coercive Conduct Should Be Treated Like Commercial Speech Which Has Been Permissibly Restricted In Response To A Substantial Governmental Interest.....	31
1. The Union's Coercive Conduct Should Be Treated Like Commercial Speech.....	31
2. The Union's Coercive Conduct Was Permissibly Restricted In Response To A Substantial Governmental Interest.....	32
3. <i>Organization For A Better Austin v. Keefe</i> , 402 U.S. 415 (1971), Is Inapplicable.....	35
C. Regulation Of The Union's Coercive Conduct Does Not Constitute An Impermissible Restriction Of Content-Based Speech.....	36
CONCLUSION.....	37

TABLE OF AUTHORITIES

	Page
<i>American Federation of Television and Radio Artists (Great Western Broadcasting Corp.)</i> , 134 NLRB 1617 (1961), <i>rev'd.</i> , 310 F.2d 591 (9th Cir. 1962), <i>supp. dec.</i> , 150 NLRB 467 (1964), <i>aff'd.</i> , 356 F.2d 434 (9th Cir.), <i>cert. denied</i> , 384 U.S. 1002 (1966) . . .	13
<i>American Radio Association v. Mobile Steamship Association, Inc.</i> , 419 U.S. 215 (1954)	33
<i>Aptheker v. Secretary of State</i> , 378 U.S. 500 (1964)	9
<i>Bolger v. Youngs Drug Products Corp.</i> , 463 U.S. 60 (1963)	32
<i>Bozhorn's Big Muskego Gun Club v. Electrical Workers Local 494</i> , 798 F.2d 1016 (7th Cir. 1986) . . .	11, 28
<i>California Motor Transport Co. v. Trucking Unlimited</i> , 404 U.S. 508 (1972)	8, 30
<i>Carpenters & Joiners Union of America, Local No. 213 v. Ritter's Cafe</i> , 315 U.S. 722 (1941)	8, 25
<i>Carey v. Brown</i> , 447 U.S. 455 (1980)	32
<i>Central Hudson Gas & Electric v. Public Service Commission</i> , 447 U.S. 557 (1980)	8, 31, 33, 34, 35
<i>Colautti v. Franklin</i> , 439 U.S. 379 (1979)	11
<i>Commodities Future Trading Commission v. Schor</i> , — U.S. —, 106 S. Ct. 3245 (1986)	9
<i>Consumer Product Safety Commission v. GTE Sylvania</i> , 447 U.S. 102 (1980)	10
<i>Crowell v. Benson</i> , 285 U.S. 22 (1932)	9

	Page
<i>Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.</i> , 472 U.S. 749 (1985)	32, 35
<i>Edward J. DeBartolo Corp. v. National Labor Relations Board</i> , 463 U.S. 147 (1983)	passim
<i>Electro-Coal Transfer Co. v. General Longshore Workers</i> , 591 F.2d 284 (5th Cir. 1979)	20
<i>Florida Gulf Coast Building and Construction Trades Council v. National Labor Relations Board</i> , 796 F.2d 1328 (1985)	1
<i>Giboney v. Empire Storage Co.</i> , 336 U.S. 490 (1949)	26, 30
<i>Hoffman v. Cement Masons Union Local 337</i> , 468 F.2d 1187 (9th Cir. 1972), <i>cert. denied</i> , 411 U.S. 986 (1973)	13
<i>Hughes v. Superior Court</i> , 339 U.S. 460 (1950)	28
<i>Industrial Contractors, Inc.</i> , 244 NLRB 1154 (1979) . .	29
<i>International Brotherhood of Electrical Workers, Local 501 v. NLRB</i> , 341 U.S. 694 (1950)	7, 12, 26
<i>International Brotherhood of Teamsters, Local 537 (Lohman Sales Co.)</i> , 132 NLRB 901 (1961)	13
<i>International Longshoreman's Assn. v. Allied International, Inc.</i> , 456 U.S. 212 (1982)	passim
<i>Kitty Kelly Shoe Corp. v. United Retail Employees of Newark Local 108</i> , 5 A.2d 682 (N.J. Ch. 1939)	17
<i>Lawrence Typographical Union No. 570</i> , 169 NLRB 279 (1968)	16

	Page
<i>Local No. 662, Radio and Television Engineers (Middle South Broadcasting Co.), 133 NLRB 1698 (1961)</i>	13
<i>Local 1976, United Brotherhood of Carpenters v. NLRB, 357 U.S. 93 (1958)</i>	33, 34
<i>Lumber and Sawmill Workers Local Union No. 2797, 156 NLRB 388 (1965)</i>	17
<i>NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)</i>	passim
<i>New Orleans Steamship Association v. General Longshore Workers, 626 F.2d 455 (5th Cir. 1980), aff'd sub. nom, Jacksonville Bulk Terminals v. International Longshoremen's Association, 457 U.S. 702 (1982)</i>	27
<i>NLRB v. Advertisers Manufacturing Co., — F.2d —, 125 LRRM 3024 (7th Cir. June 29, 1987)</i>	29
<i>NLRB v. Building Service Employee Union Local 105, 367 F.2d 227 (10th Cir. 1966)</i>	14
<i>NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979)</i>	5, 6
<i>NLRB v. Denver Building and Construction Trades Council, 341 U.S. 675 (1952)</i>	10, 34
<i>NLRB v. Fruit & Vegetable Packers Local 706 ("Tree Fruits"), 377 U.S. 58 (1964)</i>	passim
<i>NLRB v. Gissel Packaging Co., 395 U.S. 575 (1969)</i>	28
<i>NLRB v. International Brotherhood of Electrical Workers, 405 F.2d 159 (9th Cir. 1968), cert. denied, 395 U.S. 921 (1969)</i>	6, 13

	Page
<i>NLRB v. International Union of Operating Engineers, 315 F.2d 695 (3d Cir. 1963)</i>	13
<i>NLRB v. Local 825, International Union of Operating Engineers, 400 U.S. 297 (1970)</i>	15, 20
<i>NLRB v. Local Union No. 3, International Brotherhood of Electrical Workers, 477 F.2d 260, (2d Cir. 1973), cert. denied, 414 U.S. 1065 (1973)</i>	8, 27
<i>NLRB v. Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers, 434 U.S. 335 (1978)</i>	14
<i>NLRB v. Local 182, International Brotherhood of Teamsters, 314 F.2d 53 (2d Cir. 1963)</i>	16
<i>NLRB v. Retail Store Employees Union Local 1001 ("Safeco"), 447 U.S. 607 (1980)</i>	passim
<i>NLRB v. Servette, 377 U.S. 46 (1964)</i>	12, 18, 20
<i>NLRB v. State Center Warehouse & Cold Storage Co., 193 F.2d 156 (9th Cir. 1951)</i>	29
<i>NLRB v. Twin City Carpenters District Council, 422 F.2d 309 (8th Cir. 1970)</i>	14
<i>NLRB v. United Furniture Workers of America, 337 F.2d 936 (2d Cir. 1964)</i>	16
<i>NLRB v. Village IX, Inc., 723 F.2d 1360 (7th Cir. 1983)</i>	29
<i>NLRB v. Virginia Electric & Power Co., 314 U.S. 469 (1941)</i>	28
<i>NLRB v. Wine; Liquor & Distillery Workers Union Local 1, 178 F.2d 584 (2d Cir. 1949)</i>	27

	Page
<i>Ohralik v. Ohio State Bar Association</i> , 436 U.S. 447 (1978)	16, 32
<i>Organization for a Better Austin v. Keefe</i> , 402 U.S. 415 (1971)	35, 36
<i>Park'N Fly, Inc. v. Dollar Park and Fly, Inc.</i> , 469 U.S. 189 (1985)	10
<i>Pell v. Procunier</i> , 417 U.S. 817 (1974)	35
<i>Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico</i> , ___ U.S. ___, 106 S. Ct. 2968 (1986)	8, 32, 33, 34
<i>San Francisco Arts & Athletics, Inc. v. United States Olympic Committee</i> , ___ U.S. ___, 55 U.S.L.W. 5061 (June 25, 1987)	10, 33, 35
<i>Scales v. United States</i> , 367 U.S. 203 (1961)	9
<i>Searle v. Johnson</i> , 646 P.2d 682 (Utah 1982)	30
<i>Service and Maintenance Employee Union, Local 399</i> , 136 NLRB 431 (1962)	17
<i>Sheet Metal Workers International Association Local No. 48 v. Hardy Corp.</i> , 332 F.2d 682 (5th Cir. 1964)	11
<i>Smitley v. NLRB</i> , 327 F.2d 351 (9th Cir. 1984)	12
<i>Soft Drink Workers Union Local 312 v. NLRB</i> , 657 F.2d 1252 (D.C. Cir. 1980)	14, 15, 16
<i>Solien v. Carpenters District Council</i> , 623 F. Supp. 597 (E.D. Mo. 1985)	13
<i>Southeastern Community College v. Davis</i> , 442 U.S. 397 (1979)	13

	Page
<i>Thomas v. Collins</i> , 323 U.S. 516 (1945)	30
<i>Thornhill v. Alabama</i> , 310 U.S. 88 (1940)	25
<i>Udall v. Tallman</i> , 380 U.S. 1 (1965)	6, 13
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968)	9, 36
<i>United Brotherhood of Carpenters v. Sperry</i> , 170 F.2d 863 (10th Cir. 1948)	27
<i>Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.</i> , 425 U.S. 748 (1976)	31
<i>Walgreen Co.</i> , 206 NLRB 124 (1973)	29
<i>Weinberger v. Hynson, Westcott & Dunning, Inc.</i> , 412 U.S. 609 (1973)	11

CONSTITUTIONAL PROVISIONS AND STATUTES

28 U.S.C. § 1254(1)	2
National Labor Relations Act, 29 U.S.C. § 151 <i>et seq.</i>	passim
First Amendment to the Constitution of the United States	passim

MISCELLANEOUS

105 Cong. Rec. 17898 (1959)	24
Black's Law Dictionary (5th ed. 1979)	17
Bush, <i>Customers, Coercion and Congressional Intent: Regulating Secondary Consumer Boycotts Under the National Labor Relations Act</i> , 86 W. Va. L. Rev. 1127 (1984)	18

	Page
Comment, <i>The Landrum-Griffin Amendments: Labor's Use Of The Secondary Boycott</i> , 45 Cornell L.Q. 724 (1960)	17
Comment, <i>Secondary Boycotts and the First Amendment</i> , 51 U. Chi. L. Rev. 811 (1984)	25
Cox, <i>Forward: Freedom of Expression In The Burger Court</i> , 94 Harv. L. Rev. 1 (1980).	16, 32
Cox, <i>Strikes, Picketing and The Constitution</i> , 4 Vand. L. Rev. 574 (1951)	28
R. DERESHINSKY, A. BERKOWITZ, P. MISCI-MARRA, <i>THE NLRB AND SECONDARY BOYCOTTS</i> (rev. ed. 1981)	25
Goldman, <i>The First Amendment And Nonpicketing Labor Publicity Under Section 8(b)(4)(ii)(B) Of The National Labor Relations Act</i> , 36 Vand. L. Rev. 1469 (1983)	30
Gregory, <i>Picketing and Coercion: A Conclusion</i> , 39 Va. L. Rev. 1067 (1953)	17
NLRB, <i>LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959</i> (1959)	passim
Note, <i>Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech</i> , 91 Yale L.J. 938 (1960).	31
J. SUTHERLAND, <i>STATUTORY CONSTRUCTION</i> (4th ed. 1984).	11

In The
Supreme Court of the United States

October Term, 1986

THE EDWARD J. DeBARTOLO CORP.,
Petitioner,

v.

FLORIDA GULF COAST BUILDING
TRADES COUNCIL, AFL-CIO,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER¹

OPINIONS BELOW

The opinion of the court of appeals is reported at 796 F.
2d 1328 (1986), *sub nom. Florida Gulf Coast Building and*

¹ A listing of DeBartolo's parent companies, affiliates and subsidiaries (excluding wholly-owned subsidiaries) is appended to the petition for writ of certiorari. Pet. App. C, pp. 57a-61a.

Construction Trades Council v. National Labor Relations Board. Pet. App. A, pp. 1A-37A.² The supplemental decision and order of the National Labor Relations Board (the "Board") is reported at 273 NLRB No. 172 (1985), *sub. nom. Florida Golf Coast Building Trades Council*. Pet. App. A., pp. 38a-46a. This case was previously before this Court in *Edward J. DeBartolo Corp. v. National Labor Relations Board*, 463 U.S. 147 (1983) ("*DeBartolo I*"). That decision was preceded by an opinion of the Court of Appeals for the Fourth Circuit, 662 F. 2d 264 (4th Cir. 1981), and the initial decision of the Board, 252 NLRB 702 (1980).

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit granting the petition for review filed by the Respondent Florida Gulf Coast Building and Construction Trades Council (the "Union") and denying the petition for enforcement filed by the Board was issued on August 11, 1986. Pet. App. A, pp. 47A-48A. A timely petition for rehearing was denied on November 12, 1986. Pet. App. A, pp. 49A-50A.

On January 28, 1987, Mr. Justice Powell ordered that the time for filing the petition for writ of certiorari be extended to and including March 11, 1987. Pet. App. A, p. 51A. A petition for writ of certiorari was filed within this period and granted by the Court on June 8, 1987.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

²The opinions below are reproduced in the Appendix to the Petition for a Writ of Certiorari ("Pet. App."). Supplemental materials are reproduced in the separate Joint Appendix ("J.A.").

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the Constitution of the United States, in pertinent part, provides: "Congress shall make no law . . . abridging the freedom of speech. . . ."

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.* ("the Act"), provide:

Sec. 158(b). It shall be an unfair labor practice for a labor organization or its agents —

• • •

(4)(i) to engage in, or induce or encourage any individual employed by any person . . . to engage in, a strike or refusal in the course of his employment to . . . perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

• • •

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in products of any other producer, processor or manufacturer, or to cease doing business with any other person. . . .

• • •

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

STATEMENT OF THE FACTS

The facts, which are undisputed, are described in the opinions of this Court in *DeBartolo I* (463 U.S. at 148-152) and the court below (Pet. App. A, pp. 1A-3A).³ Briefly summarized, they are as follows:

Petitioner Edward J. DeBartolo ("DeBartolo") owns and operates the East Lake Square Mall ("the Mall"), a shopping center located in Tampa, Florida. One of the Mall's approximately eighty-five retail tenants (J.A., p. 22a) is the H.J. Wilson Company, Inc. ("Wilson's"). Wilson's retained High Construction Company ("High"), a general building contractor, to construct Wilson's store at the Mall. J.A., p. 23a. The Union had a labor dispute with High because it allegedly paid substandard wages and benefits. J.A., p. 24a. The Union did not have any dispute with either DeBartolo or any of the Mall tenants; they were admittedly secondary parties to the primary labor dispute between High and the Union. J.A., pp. 23a-24a; Pet. App. A, p. 15a n. 8.

For a period of approximately three weeks in 1979 and 1980, until enjoined in state court, the Union distributed a handbill⁴ at all four entrances to the Mall. 463 U.S. at 150 and n. 5. The object of the handbill, which did not identify High by name, was to cause a total consumer boycott of the Mall tenants. Pet. App. A, p. 15a n. 8. The heading of the handbill demanded: "PLEASE DON'T SHOP AT EASTLAKE SQUARE MALL PLEASE." J.A., p. 84a. The handbill further stated: "Please do not patronize the stores in the . . . Mall until the Mall's owner publicly promises

³The parties waived a hearing before a Board administrative law judge and submitted this case directly to the Board on a joint stipulation of facts. The entire factual record consists of that stipulation and the exhibits thereto. J.A., pp. 19a-88a.

⁴The handbill is reproduced at both 463 U.S. at 150 n. 3 and at pages 84a-85a of the joint appendix.

that all construction at the Mall will be done using contractors who pay their employees fair wages and fringe benefits." J.A., pp. 84a-85a. There was no picketing or patrolling, and the handbilling was conducted in a peaceful and orderly manner.

DeBartolo filed unfair labor practice charges alleging that the Union was engaging in a secondary boycott in violation of Section 8(b)(4) of the Act. Although the Board's General Counsel issued a complaint, the Board dismissed the complaint on the ground that the handbilling was protected by the publicity proviso exception to Section 8(b)(4). 252 NLRB 702 (1980). The Court of Appeals for the Fourth Circuit affirmed. 662 F. 2d 264 (1981). That decision was reversed in *DeBartolo I*. This Court unanimously held that "the Board erred in concluding that the handbills came within the protection of the publicity proviso." 463 U.S. at 157. The case was remanded to address the open issues of whether the handbilling "was covered by Section 8(b)(4) (ii)(B) or protected by the First Amendment." 463 U.S. at 153, 157-58.

On remand, the Board concluded that the Union had "engaged in conduct coercive within the meaning of Section 8(b)(4)(ii)" which Congress had "intended to proscribe" and that "this proscription accords with the Constitution." Pet. App. A, pp. 42a-43a. The Eleventh Circuit disagreed. In a *per curiam* decision by a quorum of the panel (Pet. App. A, p. 1a), that court purported to apply the doctrine of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). The court first decided that, if Section 8(b)(4) precluded handbilling, "serious constitutional issues will arise." J.A., p. 13a. It then determined that there was "no affirmative intention of Congress clearly expressed to prohibit [handbilling or other] nonpicketing labor publicity." J.A., p. 13a. Absent such an intent, the Eleventh Circuit concluded, the Act had to be construed to prohibit only picketing. *Id.* The Board's subsequent petition for rehearing

was denied without opinion. Pet. App. A, p. 49a.

SUMMARY OF ARGUMENT

1. The *Catholic Bishop* doctrine, as this Court emphasized in *DeBartolo I*, "serves only to authorize the construction of a statute in a manner that is 'fairly possible.'" 463 U.S. at 157. The construction of Section 8(b)(4)(ii)(B) by the court of appeals, which effectively substitutes "picket" for "threaten, coerce, and restrain" as the prohibitory language of that Section, is not "fairly possible." The terms used by Congress were not vague or ambiguous; they were words of art that had a recognized meaning. The court of appeals' definition also renders the publicity proviso to Section 8(b)(4) a nullity. That proviso protects certain specified nonpicketing publicity. The proviso, accordingly, would "be deprived of substantial practical effect" (*DeBartolo I*, 463 U.S. at 158 n. 11) if, as the decision below concluded, Congress intended to protect all nonpicketing publicity. The decision below thus disregards the plain language of the Act.

The court of appeals further ignored the established construction that has heretofore been given the prohibitory language of Section 8(b)(4)(ii)(B). That Section has never been limited to only "strikes and picketing"; it has always included as well other coercive tactics, unprotected by the proviso, that are used "as a means of bringing economic pressure against the secondary employer." *NLRB v. International Brotherhood of Electrical Workers*, 405 F. 2d 159, 161-62 (9th Cir. 1968), cert. denied, 395 U.S. 921 (1969). That interpretation, as the Board's consistent, longstanding position, is entitled to "great deference." *Udall v. Tallman*, 380 U.S. 1, 16 (1965). The Board correctly concluded, therefore, that the Union's conduct, demanding that consumers refuse to shop at all of the Mall stores, constituted unlawful coercive "economic retaliation" against the secondary employers. Pet. App. B, p. 42a n. 6. The "foreseeable consequences" of that coercion was to imper-

missibly "threaten neutral parties with ruin or substantial loss." *NLRB v. Retail Store Employees Union Local 1001 ("Safeco")*, 447 U.S. 607, 614, 615 n. 9 (1980).

The decision below finds no support in the legislative history of Section 8(b)(4). Conversely, it emasculates the "delicate balance" effectuated by Congress "between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982); *Safeco*, 447 U.S. at 617-18 (Blackmun, J., concurring). The underlying concern of Congress was the "direct coercion of secondary employers." The House bill "reache[d] not only picketing but leaflets, radio broadcasts and newspaper advertisements" and would have prevented *any* appeal by unions "to the general public as consumers for assistance in a labor dispute." *NLRB v. Fruit & Vegetable Packers Local 706 ("Tree Fruits")*, 377 U.S. 58, 68 n. 17, 69 (1964). When the Senate conferees refused to agree to this sweeping prohibition, the result was a compromise publicity proviso. That proviso authorized some, but not all, publicity apart from picketing. Other nonpicketing publicity continued to be barred by the statute. *Id.* at 70-71. Congress' prohibitory objective was "keyed to the coercive nature of the conduct, whether it be by picketing or otherwise." *Id.* at 68 (emphasis added). It was not exclusively focused, as the court of appeals concluded (Pet. App. A, p. 19a), merely on "nonconsumer picketing and more direct economic actions, e.g., strikes."

2. The "prohibition of inducement or encouragement of secondary pressure," as this Court has repeatedly recognized with respect to Section 8(b)(4), its predecessor provision and similar state regulation, "carries no unconstitutional abridgment of free speech." *International Brotherhood of Electrical Workers Local 501 v. NLRB*, 341 U.S. 694, 705 (1950). Both "[s]econdary boycotts" as well as "picketing" have been constitutionally regulated (*NAACP*

v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982)) pursuant to the power of the states and Congress "to set the limits of permissible contest open to industrial combatants" (*Carpenters & Joiners Union of America, Local No. 213 v. Ritter's Cafe*, 315 U.S. 722, 728 (1941)).

The fact that the Union here chose to use handbilling urging a total consumer boycott rather than picketing as the means to coerce the secondary employers does not make these principles inapplicable. The use of one form of coercion instead of another is a "distinction without a difference" (*NLRB v. Local Union No. 3, International Brotherhood of Electrical Workers*, 477 F.2d 260, 266 (2d Cir. 1973), *cert. denied*, 414 U.S. 1065 (1973)); in numerous instances various forms of nonpicketing secondary coercion have been found to be unprotected by the First Amendment. The handbilling in this case was an essential part of a course of Union conduct that had the unlawful objective of imposing substantial injury on neutral parties. The Union's "First Amendment rights" were, as a result, "not immunized from regulation when they [were] . . . used as an integral part of conduct which violates a valid statute." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 514 (1972).

The Union's conduct here was also no different than commercial speech. Like commercial speech, it was of a private and economic character which, rather than request political action, instead proposed a "commercial transaction." *Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557, 561-62 (1980). Accordingly, the Union's conduct did not "rest on the highest rung of First Amendment values" (*Claiborne*, 458 U.S. at 913) and was subject to regulation because "the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interest, and the restrictions are no more extensive than necessary to serve that interest." *Posadas de Puerto Rico Associates v. Tourism Com-*

pany of Puerto Rico, ___ U.S. ___, 106 S. Ct. 2968, 2976 (1986). Indeed, even if judged by the more stringent standard applicable to political speech, a prohibition of the particular coercive tactics here at issue, which left available to the Union numerous alternative avenues of expression, was a legitimate exercise of a substantial governmental interest narrowly drawn to no greater extent than necessary to further that interest. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

ARGUMENT

The *Catholic Bishop* doctrine does not grant this Court "the prerogative to ignore the legislative will in order to avoid constitutional adjudication. . . . '[I]t must not and will not carry [the doctrine] . . . to the point of perverting the purpose of a statute . . . or judicially rewriting it.'" *Commodities Future Trading Commission v. Schor*, ___ U.S. ___, 106 S. Ct. 3245, 3252 (1986).⁵ The requisite analysis, where a statutory interpretation would arguably give rise to a serious constitutional question, is not, as the court of appeals concluded, restricted solely to determining whether that interpretation is in accord with "the affirmative intention of the Congress clearly expressed." J.A., p. 5a. This approach is permissible only where the statute "is equally susceptible of two constructions, under one of which it is clearly valid and under the other of which it may be unconstitutional. . . ." *Crowell v. Benson*, 285 U.S. 22, 62 (1932). As *DeBartolo I*, citing *Crowell*, admonished, *Catholic Bishop* "serves only to authorize the construction of a statute in a manner that is 'fairly possible.'" 463 U.S. at 157.

The initial inquiry here must then be to determine

⁵The quotation in *Schor* was from *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964), which in turn quoted from *Scales v. United States*, 367 U.S. 203, 211 (1961).

whether Section 8(b)(4) is "equally susceptible" of a construction which limits its prohibition to only secondary picketing. As shown below, that interpretation of the Act is not "fairly possible." It both perverts "the concern that motivates all of § 8(b)(4): 'shielding unoffending employers and others from pressures in controversies not their own'" (*DeBartolo I*, 463 U.S. at 155-56, quoting *NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675, 692 (1952)) and, as in *DeBartolo I* (463 U.S. at 158 n. 11), would cause "the statutory language to be deprived of substantial practical effect."

I. THE PROHIBITION OF SECTION 8(b)(4) ENCOMPASSES COERCIVE SECONDARY CONDUCT NOT PROTECTED BY THE PUBLICITY PROVISIO

A. The Language Of Section 8(b)(4) Encompasses Coercive Secondary Conduct Not Protected By The Publicity Proviso

"Statutory construction must begin with the language employed by Congress. . . ." *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985); *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, ___ U.S. ___, 55 USLW 5061, 5062 (June 25, 1987). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1980). The decision below, however, contravenes, rather than respects, the statutory language.

Section 8(b)(4)(ii)(B) provides that it is an unfair labor practice for a labor organization "to threaten, coerce, or restrain" a secondary party to a labor dispute where the objective is to force that secondary to cease doing business with another person. There is no dispute here either that the Mall tenants were secondary employers or that the Union's objective was that forbidden by the Act. J.A.,

p. 15a n. 8. The pertinent statutory question is whether the specific words "threaten, coerce and restrain" are, as the court of appeals concluded, to now be deleted and replaced with the word "picket." This rewriting of the Act ignores the recognized ability of Congress, when it "meant to bar picketing per se . . . to ma[ke] its meaning clear; for example, § 8(b)(7) makes it an unfair labor practice, 'to picket or cause to be picketed. . . .'" *Tree Fruits*, 377 U.S. at 68 (1964). It also fails to appreciate that Congress used precise words – "words of art" such as "coercion" that had a recognized and established meaning⁶ – when it enacted Section 8(b)(4). That statutory language is the best indication of Congress' intent.

It is, of course, also a "well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect." *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973). See, to the same effect, *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); Sutherland, *Statutory Construction*, § 46.06, p. 104. The decision below disregards this canon of construction. By substituting "picket" for "threaten, coerce or restrain," the publicity proviso has become a "pointless gesture, exempting a subset of publicity none of which is covered to begin with. . . . [T]he publicity proviso [has been rendered simply] . . . so much blather." *Bozhorn's Big Muskego Gun Club v. Electrical Workers Local 394*, 798 F. 2d 1016, 1024 (7th Cir. 1986). The court of appeals' relegation of the proviso to merely precatory language similarly renders sur-

⁶ See, e.g., *Sheet Metal Workers International Association Local No. 48 v. Hardy Corp.*, 332 F. 2d 682, 686 (5th Cir. 1964) ("We believe that Congress used 'coerce' in [Section 8(b)(4)(ii)(B)] . . . as a word of art, and that it means no more than nonjudicial acts of a compelling or restraining nature, applied by way of concerted self help consisting of a strike, picketing or other economic retaliation or pressure in a background of a labor dispute.") (emphasis added).

plusage this Court's extensive discussions of the proviso in both *De Bartolo I* and *NLRB v. Servette*, 377 U.S. 46 (1964). In *DeBartolo I*, this Court recognized that, but for the proviso, other "communications" (463 U.S. at 153) and nonpicketing "publicity" (*id.* at 154-55) would fall within the proscription of Section 8(b)(4); "[t]he only publicity exempted from the prohibition is [that] publicity [protected by the proviso]" (*id.* at 155; emphasis added). If, therefore, as *DeBartolo I* concluded, "Congress had intended all peaceful truthful handbilling that informs the public of a primary dispute to fall within the proviso, the statute would not have contained a distribution requirement" (*id.* at 156), or, indeed, required any proviso at all. Stated differently, if, as *Servette* (377 U.S. at 55) held, "[t]here is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower than the prohibition to which it is an exception," the converse proposition forecloses the result reached by the decision below.⁷

This is not the initial examination of the prohibitory language of Section 8(b)(4). It is the first time, however, that the "interpretation would give more significance to the means used than to the end sought." *International Brotherhood of Electrical Workers Local 501 v. NLRB*, 341 U.S. at 702. The accepted definition of the prohibited conduct has been that "[t]he statute in its present form deals with secondary boycotts and its provisions are not restricted to the use of force or violence as a means of bringing pressure against the secondary employer, but includes economic sanctions also' . . . Nor are the latter limited to strikes and

⁷ See, e.g., the interpretation of the proviso to Section 8(b)(7)(C) of the Act, Section 8(b)(4)'s companion section, in *Smitley v. NLRB*, 327 F. 2d 351, 353 (9th Cir. 1984) ("Unless that proviso refers to picketing having as 'an object' either recognition or organization, it can have no meaning, for it would not be an exception or proviso to anything.").

picketing." *NLRB v. International Brotherhood of Electrical Workers*, 405 F. 2d at 161-62, quoting *NLRB v. International Union of Operating Engineers*, 315 F. 2d 695, 697 (3d Cir. 1963). This view also has been the "consistent" and "longstanding" (*Southeastern Community College v. Davis*, 442 U.S. 397, 41112 n. 11 (1979)) position of the Board, the expert administrative tribunal whose interpretation of the statute is entitled to "great deference." *Udall v. Tallman*, 380 U.S. at 16. From the enactment of Section 8(b)(4) in 1947 through its decision in the instant case, the Board has consistently found that, absent the protection of the publicity proviso, union conduct which, as here, demands that customers entirely forego business with neutral secondary employers constitutes an unlawful secondary boycott.⁸

⁸ In *American Federation of Television and Radio Artists (Great Western Broadcasting Corp.)*, 134 NLRB 1617 (1961), *rev'd.*, 310 F. 2d 591 (9th Cir. 1962), *supp. dec.*, 150 NLRB 467, 470-72 (1964), *aff'd.*, 356 F. 2d 434 (9th Cir.), *cert. denied* 384 U.S. 1002 (1966), for example, the Board on remand considered that question and concluded that, because the union was advocating a total boycott of the secondary employers rather than a single product boycott, "such conduct clearly constitute[d] threats, restraint, or coercion within the meaning of Section 8(b)(4)(ii) of the Act." 150 NLRB at 471. See also *Local No. 662, Radio and Television Engineers (Middle South Broadcasting Co.)*, 133 NLRB 1698, 1705 (1961) ("[U]nless protected by the proviso to Section 8(b)(4), Respondent's circulation and distribution of the 'Do Not Patronize' leaflets urging a consumer boycott of secondary employers still advertising on WOGA, would constitute 'restraint or coercion' within the meaning of Section 8(b)(4)(ii)(B) and a violation of that section."); *International Brotherhood of Teamsters, Local 537 (Lohman Sales Co.)*, 132 NLRB 901, 904 (1961) ("While such conduct otherwise might constitute restraint and coercion . . . Respondent's handbilling in this case was protected by the proviso to Section 8(b)(4).").

The decision of District Judge Nagle in *Solien v. Carpenters District Council*, 623 F. Supp. 597 (E.D. Mo. 1985), also should be noted. There, the court, relying on *Hoffman v. Cement Masons Union Local 337*, 468 F.2d 1187 (9th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973), rejected the argument that "the peaceful and orderly distribution of handbills, which informed consumers of substandard wages and construction flaws, cannot be considered a violation of Section 8(b)." 623 F. Supp. at 600.

The court of appeals erred, accordingly, when, by ignoring the plain meaning of the Act's prohibitory language and the longstanding construction of that provision, it reached a result which deprived the statute of "substantial practical effect." *DeBartolo I*, 463 U.S. at 158 n. 11.

B. The Union's Conduct Was Coercive Within The Meaning Of Section 8(b)(4)

By urging a total boycott of all the tenants of the Mall, the Union was, as the Board concluded, "attempt[ing] to inflict economic harm on secondary employers by causing them to lose business" and thereby engaging in coercive "economic retaliation." Pet. App. B, p. 42a n. 6. This determination, in an area "entrusted to the Board's expertise" (*Safeco*, 447 U.S. 607, 616 n. 11 (1980)), is a "defensible construction of the statute and is entitled to considerable deference." *NLRB v. Local No. 103, International Association of Bridge, Structural and Ornamental Iron Workers*, 434 U.S. 335, 350 (1978). "Coercion" was defined by this Court in *Safeco* to encompass that conduct which "predictably encourages customers to boycott a secondary business" (447 U.S. at 616), or which "reasonably can be expected to threaten neutral parties with ruin or substantial loss" (*id.* at 614). No "actual empirical evidence" is required; "Section 8(b)(4), rather, is concerned with the nature of the pressure the union imposes on the secondary and the reasonably foreseeable effects of that pressure." *Soft Drink Workers Union Local 812 v. NLRB*, 657 F. 2d 1252, 1267 (D.C. Cir. 1980). Even "inept, desultory" union action "at a time of little sales activity" which reaches only a "small group" of customers "is sufficient if it exerts" some pressure "on the secondary employer." *NLRB v. Twin City Carpenters District Council*, 422 F. 2d 309, 315 and n. 7 (8th Cir. 1970). A union cannot "avoid the legal implications and consequences of its coercive acts simply by calling attention to its failure to achieve observable coercive results." *NLRB v. Building Service Employees Union*

Local 105, 367 F. 2d 227, 230 (10th Cir. 1966).

The "foreseeable consequences" (*Safeco*, 447 U.S. at 615 n. 9) of the Union's conduct here was to impose significant economic harm on the Mall tenants. For three weeks the Union handbilled on private property at all four entrances to the Mall's interior enclosed area. The activity ceased only when enjoined in state court. J.A. 24a, 25a, 86a. The Union did not seek to simply publicize its dispute with High; the heading of the handbill boldly demanded "PLEASE DON'T SHOP AT EAST-LAKE SQUARE MALL PLEASE." J.A., p. 84a.⁹ The Union thus sought to "shut off all trade with the secondary employer[s] unless [they]... aid[ed] the union in its dispute with the primary employer." *Tree Fruits*, 377 U.S. at 70-71. The "foreseeable consequences of [this]... secondary pressure [were neither] slight" (*NLRB v. Local 825, International Union of Operating Engineers*, 400 U.S. 297, 305 (1970)) nor "trivial" (*Soft Drink Workers Union Local 812*, 657 F. 2d at 1267). To the contrary, the Union's conduct, as the Board concluded, could reasonably have been expected to cause significant harm to the Mall tenants.

It may be that picketing would have imposed an even greater economic injury on the secondary employers. That possibility, however, is both irrelevant and debatable. It is irrelevant because, as demonstrated above, the criterion

⁹The handbill was not, therefore, confined to merely stating the facts of the Union's disagreement with High or even High's relationship to Wilson's, DeBartolo, or the Mall tenants. It repeatedly requested that customers not patronize the stores in the Mall and urged that they continue that boycott until DeBartolo "publicly promise[d] that all construction at the Mall will be done using contractors" who, in the Union's opinion, paid "their employees fair wages and benefits" (J.A., pp. 84a-85a), a demand which DeBartolo, who had no relationship with either High or many other contractors, could never meet.

for coercion is not the means used, but, instead, the foreseeable effect of the secondary pressure; "the phrase 'threaten, coerce or restrain' does not describe any sort of measurable physical conduct suggested by the ordinary meaning of those words, but is rather a term of legislative art designed to capture certain types of boycotts deemed harmful by Congress. . . ." *Soft Drink Workers Union Local 825*, 657 F. 2d at 1267 n. 27, citing *Tree Fruits*, 377 U.S. at 71. Moreover, the "on-the-spot handbilling" here at issue "can be a particularly effective form of pressure" (*Bozhorn's*, 798 F. 2d at 1020); like in-person solicitation, it "may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection" (*Okralik v. Ohio State Bar Association*, 436 U.S. 447, 457 (1978)). The instant handbilling was surely a far more coercive form of pressure on the secondary employers than if, for example, the Union had utilized various other tactics which have been construed as "picketing," for example, planting a few signs on the public ground outside the Mall entrances (see *NLRB v. Local 182, International Brotherhood of Teamsters*, 314 F. 2d 53, 57-58 (2d Cir. 1963)), or affixing signs to nearby telephone poles or trees (cf. *NLRB v. United Furniture Workers of America*, 337 U.S. 936, 940 (2d Cir. 1964)), or placing signs next to a small trailer located across from the Mall (see *Lawrence Typographical Union No. 570*, 169 NLRB 279, 282-84 (1968)), or, as in *Tree Fruits*, by two or three "slightly built, white-haired and gentle, elderly ladies" wearing placards and distributing handbills on the public property adjacent to the Mall (see 377 U.S. at 60; Cox, *Forward: Freedom of Expression In The Burger Court*, 94 Harv. L. Rev. 1, 37 (1980)). Indeed, the distribution of handbills, by itself, has

been found to be "picketing."¹⁰ It is not surprising, therefore, that, on another occasion before this Court, a union argued that "having a large number of people hand out leaflets . . . would appear to be potentially more disruptive than a handful of pickets,"¹¹ or that one knowledgeable commentator concluded that "I can't see much difference between strikes, boycotts and picketing as far as their net effect is concerned."¹²

¹⁰ See, e.g., *Kitty Kelly Shoe Corp. v. United Retail Employees of Newark Local 108*, 5 A.2d 682, 684 (N.J. Ch. 1939) ("the posting by the league of its representatives in front of the store entrance of complainant and at the curb of the sidewalk opposite the store entrance for the purpose of distributing the handbill . . . constitutes picketing."); *Lumber and Sawmill Workers Local Union No. 2797*, 156 NLRB 388, 393-95 (1965) (handbilling following the discontinuance of picketing held to be "picketing"; "[t]he important feature of picketing appears to be the posting by a labor organization . . . of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as . . . keeping customers away from the employer's business."); *Service and Maintenance Employees Union, Local 399*, 136 NLRB 431, 432, 437 (1962) (marching in front of a plant carrying no placards, wearing no armbands, making no oral appeals, and communicating the purpose of the action only by the distribution of handbills, found "picketing" by certain Board members); see also Comment, *The Landrum-Griffin Amendments: Labor's Use Of The Secondary Boycott*, 45 Cornell L.Q. 724, 760-62 (1960); Black's Law Dictionary (5th ed.), p. 1033 (picketing "refers to presence at an employer's business by one or more employees and/or other persons to publicize labor dispute. . . .") (emphasis added).

¹¹ Brief for the Respondent Union in *Safeco*, pp. 81-82.

¹² Gregory, *Picketing and Coercion: A Conclusion*, 39 Va. L. Rev. 1067, 1069 (1953).

C. The Legislative History Of Section 8(b)(4) Demonstrates Congress' Intent To Encompass Coercive Secondary Conduct Not Protected By The Publicity Proviso

If the statutory language was ambiguous, which, as shown above, it is not, then the next inquiry would be to discern whether Congress sought to prohibit all coercive secondary conduct outside the proviso or only a particular form thereof. As will be demonstrated, the "[l]egislative history leaves little doubt that both supporters and opponents of the Act's consumer boycott compromise [of the 1959 amendments] believed that the new subsection 8(b)(4)(ii) covered all consumer boycotts" apart from the specific conduct exempted by the publicity proviso. Bush, *Customers, Coercion and Congressional Intent: Regulating Secondary Consumer Boycotts Under the National Labor Relations Act*, 86 W. Va. L. Rev. 1127, 1138 (1984). The purpose of Section 8(b)(4)(ii)(B), after all, was "to prevent neutrals from becoming innocent victims in contests between others" (*Safeco*, 447 U.S. at 614 n. 8) and to "strengthen . . . the [Act's] secondary boycott prohibition." (*DeBartolo I*, 463 U.S. at 154.) Because the effect of "understandable and even commendable" secondary boycott actions is "to impose a heavy burden on neutral employers . . . it is just such a burden, as well as the widening of industrial strife, that the secondary boycott provisions were designed to prevent." *International Longshoremen's Association v. Allied International, Inc.*, 456 U.S. 212, 223 (1982).

The history of the 1959 amendments is discussed in *Servette* (377 U.S. at 51-54), *Tree Fruits* (377 U.S. at 63-71) and the decision below (Pet. App. A, pp. 15a-37a). Certain salient points should be noted. First, one of the underlying concerns of those seeking to change the law was to preclude the "direct coercion of secondary employers." *Tree Fruits*, 377 U.S. at 68 n. 17. This concern is mani-

festated throughout the legislative history: for example, (a) the Eisenhower Administration's bill, which became the House Landrum-Griffin bill (*Tree Fruits*, 377 U.S. at 67), proposed to amend the Act "to cover the direct coercion of employers to cease or agree to cease doing business with other persons" (Pet. App. A 17a, citing 1 NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* ("Leg. Hist."), at 82); (b) the Senate proponents of a change, in their minority report on the Kennedy-Ervin bill, similarly "focused on 'coercion of employers'" (Pet. App. A, p. 18a, citing 1 Leg. Hist. at 474-75); (c) Representative Griffin expressed an intent to prohibit "economic retaliation" (2 Leg. Hist. at 1523) and union conduct whose "purpose" is "to coerce or restrain the employer of . . . [a] secondary establishment" (*Safeco*, 477 U.S. at 615 n. 10); (d) Senator Curtis stated that the final bill will preclude "any type of coercion or restraint where the object is to force one person to cease doing business with another" (2 Leg. Hist. at 1441); (e) Senator McClellan offered an amendment to curb boycotts which specifically mentioned union appeals involving "pressure in the form of dissuading customers from dealing with secondary employers" (2 Leg. Hist. 1194);¹³ and (f) Senator Goldwater, who both supported the Administration's bill and proposed his own amendments, explained that a "secondary consumer, or customer, boycott includes the refusal of consumers or

¹³ The court of appeals (Pet. App., pp. 19a-20a) found that Senator McClellan "intended only to prohibit picketing of the secondary merchant," notwithstanding that his amendment would have broadly made "it unlawful 'to exert, or attempt to exert any economic or other coercion against . . . any [secondary] person'" (2 Leg. Hist. 1193 (emphasis added)). Moreover, even Senator McClellan's comments cited by the decision below refer only to picketing as "a form of coercion against an innocent employer" (emphasis added) and indicate that his amendment "covers pressure in the form of dissuading customers from dealing with secondary employers." See *Tree Fruits*, 377 U.S. at 65.

customers to buy the products or services of one employer in order to force him to stop doing business with another employer" (2 Leg. Hist. 1386; *Tree Fruits*, 377 U.S. at 65 n. 10).¹⁴ The legislative history thus comports with *Tree Fruits*' conclusion that "the prohibition of § 8(b)(4) is keyed to the coercive nature of the conduct, whether it be picketing or otherwise." 377 U.S. at 68 (emphasis added).¹⁵ The proponents of a change addressed, as the court of appeals recognized (Pet. App., p. 18a), all "coercion of employers" designed "to cut off the business of a secondary employer as a means of forcing him to stop doing business with the

¹⁴ While, as the court of appeals states (Pet. App., p. 17a), Secretary of Labor Mitchell "did not refer to consumer picketing as making the amendments necessary," he did indicate that the Administration bill "prohibits coercion for the purpose of bringing pressure on an employer not to buy merchandise from a neutral third party." *Servette*, 377 U.S. at 53 n. 9 (emphasis added). Similarly, in President Eisenhower's August 6, 1959 address, he emphasized that "[c]hief among the abuses from which Americans need protection are the oppressive practices of coercion"; he did not, as the Eleventh Circuit concluded, "frame . . . the problem solely in terms of consumer picketing" (Pet. App. p. 21a) but, rather, cited that particular form of coercion only as "an example of a secondary boycott." 2 Leg. Hist. 1842.

¹⁵ The court of appeals (Pet. App. 234a n. 14) dismissed *Tree Fruits*' determination as to the reach of Section 8(b)(4)'s prohibition on the basis that it could "refer to many types of conduct" and not necessarily include "non-picketing labor publicity." While the first premise is correct, the latter assumption is highly unlikely. The other non-picketing forms of coercion which the court of appeals conceded were within the prohibitory ambit of Section 8(b)(4) (a demand for settlement payment in *Electro-Coal Transfer Co. v. General Longshore Workers*, 591 F. 2d 284, 289 (5th Cir. 1979)); threats to terminate a union agreement in *NLRB v. International Brotherhood of Electrical Workers*, 405 F. 2d at 161-62; and the refusal to refer members for employment in *NLRB v. Local 825, International Union of Operating Engineers*, 315 F. 2d at 697-98) were certainly no greater "abuses" or "isolated evils" (*Tree Fruits*, 377 U.S. at 67, 70) than coercive handbilling at the secondary employer's place of business.

primary employer" (*Tree Fruits*, 377 U.S. at 68). Congress' concern was not merely restricted to some of the particular forms of coercion, such as "non-consumer picketing and more direct economic actions, e.g., strikes" (Pet. App. A, 19a), that could be utilized to achieve that end.

Second, when the Conference Committee subsequently analyzed the Senate and House bills, the conclusion was that the latter "reache[d] not only picketing but leaflets, radio broadcasts and newspaper advertisements" and "prevent[ed] unions from appealing to the general public as consumers for assistance in a labor dispute." *Tree Fruits*, 377 U.S. at 69, citing the joint analysis of the Senate and House bills by Senator Kennedy and Representative Thompson, as the chairman and a member of the Conference Committee, recommending the final amendments that were enacted, at 2 Leg. Hist. 1708.¹⁶ See, to the same effect, the recognition by Senator Kennedy, the Conference Committee chairman, that the Landrum-Griffin bill "prohibited not only secondary picketing, but even the handing out of handbills or even taking out an advertisement in a newspaper." 2 Leg. Hist. 1389.¹⁷ This joint analysis was "the

¹⁶ The analysis, in further discussing the differences between the House and Senate bills, described secondary boycotts as: "The union brings pressure upon the employer with whom it has a dispute (called the "primary" employer) by inducing . . . the customer not to patronize until the secondary employer stops dealing with the primary employer. Or the union may simply induce . . . the customers not to buy . . . as a way of putting pressure upon him." 2 Leg. Hist. 1706.

¹⁷ Given the "sweeping nature of the House bill" (*Tree Fruits*, 377 U.S. at 69), it is not surprising that numerous references to handbilling and non-picketing publicity were made by opponents of the House bill. See, e.g., the remarks of Representative Madden at 2 Leg. Hist. 1552 (the Landrum-Griffin bill "would prohibit any union from advising the public that an employer is unfair to labor, pays substandard wages, or oper-

(Footnote continued on the following page)

genesis of the publicity proviso." *Tree Fruits*, 377 U.S. at 91 (Harlan and Stewart, J.J., dissenting). Because the Senate bill had no similar provision, "the Senate conferees refused to accede to the House proposal without safeguards for the right of unions to appeal to the public, even by some conduct which might be 'coercive.' The result was the addition of the proviso." *Tree Fruits*, 377 U.S. at 69. The proviso, of course, protected some non-picketing union consumer appeals. It did not, however, as *DeBartolo I* makes clear, protect all non-picketing publicity. The concern which the proviso addressed, as shown above, was to limit the broad reach of the House bill, not, as the court of appeals stated (Pet. App. 25a-26a), simply to focus on the "typical case" of secondary action against a retail store selling a struck manufacturer's product.

Senator Kennedy's subsequent remarks to the Senate (see *Tree Fruits*, 377 U.S. at 69-70) and Representative Thompson's similar listing of the major changes made by the Conference Committee (2 Leg. Hist. 1720), while

17 (Continued)

ates a sweatshop . . . "); the analysis of the House bill by Representative Thompson and Udall at 2 Leg. Hist. 1576 (the "Lan-drum bill forbids this elementary freedom to appeal to the general public for assistance in winning fair labor standards."); and Representative Thompson's remarks on the Conference agreement at 2 Leg. Hist. 1720 ("[a]ll appeals for a consumer boycott would have been barred by House bill"). The silence of the House bill's supporters in the face of this criticism can lead, to adopt Mr. Justice Harlan's argument in *Tree Fruits*, to only one of two inferences: "Either the distinction drawn by [the court of appeals] . . . was not considered of sufficient significance to require comment, or the proponents recognized a difference between the two types of consumer [appeals] . . . but assumed that the bill encompassed both. Under either supposition, the conclusion reached by the [court of appeals] . . . is untenable." *Tree Fruits*, 377 U.S. at 92 (Harlan and Stewart, J.J., dissenting).

indicating that the proviso would permit some informational activity short of picketing, do not compel the conclusion that the Conference Committee sanctioned all non-picketing publicity any more than they require a finding that all picketing was forbidden. See *Tree Fruits*, 377 at 70. As *Tree Fruits* (*id.* at 70-71) observed, "[t]he proviso indicates . . . that the Senate conferees' constitutional doubts led Congress to authorize publicity other than picketing which [meets the terms of the proviso] . . . but not such publicity [which is outside the proviso] . . ." ¹⁸

Finally, because, as already demonstrated, Congress' objective was "keyed to the coercive nature of the conduct, whether it be picketing or otherwise" (*Tree Fruits*, 377 U.S. at 68), the scarcity of repeated references by House bill proponents to the inclusion of handbilling cannot be equated to an absence of the requisite legislative intent. Such conduct is plainly encompassed by the language of Section 8(b) (4) (ii)(B). It also is clearly within the ambit of "one of the evils that Congress intended [that Section] . . . to prevent": the creation of "a separate dispute with the secondary employer." *Safeco*, 447 U.S. at 613, citing *Tree Fruits*, 377 U.S. at

¹⁸ The court of appeals (Pet. App. A, pp. 26a-31a) placed great emphasis upon the Summary Analysis of Conference Agreement (2 Leg. Hist. at 171213), which, with respect to the House bill, indicated that, it "prohibit[ed] secondary customer picketing at retail store which happens to sell product produced by manufacturer with whom union has dispute," and, with respect to the Conference Agreement, indicated that it "adopt[ed] the House provision with clarification that other forms of publicity are not prohibited." This reliance is misplaced. To the questionable extent the Analysis, as a "single statement" (*Tree Fruits*, 377 U.S. at 70), even constitutes a guide to the Conference Agreement, *Tree Fruits* underscores that it incorrectly defines the prohibition against struck product customer picketing (see *Tree Fruits*, 377 U.S. at 91-92 (Harlan and Stewart J.J., dissenting)) just as *DeBartolo I* underscores that it incorrectly defines the limited scope of the conduct permitted by the publicity proviso.

72. Nothing in the statute, in short, lends support to the distinction drawn by the court of appeals. The Act's sweeping language prohibits all threats, coercion and restraint of any person. It sought, as Senator Goldwater stated in explaining the House bill, to "close up *every* loophole in the boycott section of the law *including* the use of a secondary consumer picket line. . . ." 2 Leg. Hist. 1437 (emphasis added). The proviso thereafter added created certain specific exceptions to that broad prohibition in order to permit some, but not all, non-picketing union appeals. Section 8(b)(4) was, as Senator Kennedy acknowledged, "the product of compromise." 105 Cong. Rec. 17898 (1959). Such a compromise did not attempt to exhaustively list all conceivable means that a union could utilize, other than picketing, to coerce a secondary employer. Apart from the conduct expressly sanctioned by the proviso, all other coercive union appeals, whether by picketing or otherwise, were intended to be proscribed. That was the legislative compromise. There is no other construction of the statute that is "fairly possible."

II. PROHIBITING COERCIVE SECONDARY CONDUCT DOES NOT CONTRAVENE THE FIRST AMENDMENT

The 1959 amendments to the Act were adopted against the backdrop of this Court's repeated recognition that the regulation of coercive secondary boycotts is constitutionally permissible. For example, as early as 1941, when Texas sought "to localize industrial conflict by prohibiting the exertion of concerted pressure directed at the [secondary] business," rather than merely "outlaw whatever psychological pressure may be involved in the mere communication by an individual of the facts relating to his differences with another," this Court held that the Fourteenth Amendment did not deprive the states of the authority to prevent "the disputants in a particular industrial episode . . . [from] conscript[ing] neutrals having no relation to either the dispute or the industry in which it

arose. . . . ' This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants.' " *Ritter's Cafe*, 315 U.S. at 726-28, quoting *Thornhill v. Alabama*, 310 U.S. 88, 103-04 (1940).

When the Act in 1947 similarly condemned the "substantive evil . . . [of] the secondary boycott," this Court held that Congress had the same constitutional right as the states: "The prohibition of inducement or encouragement of secondary pressure . . . carries no unconstitutional abridgment of free speech." *International Brotherhood of Electrical Workers*, 341 U.S. at 705. This axiom has similarly governed this Court's decisions subsequent to the 1959 amendments to the Act. "Secondary boycotts and picketing," the Court has continuously recognized, "may be prohibited, as part of 'Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.'" *Clai-borne*, 458 U.S. at 912, quoting *Safeco*, 447 U.S. at 617-18 (Blackmun, J., concurring), and citing *International Longshoremen's Association v. Allied International, Inc.*, 456 U.S. 212, 222-23 and n. 20 (1982) (emphasis added). Congress' attempt "to effect an accommodation" is "entitled to great deference." *Tree Fruits*, 377 U.S. at 93 (Harlan and Stewart, J.J. dissenting). Section 8(b)(4)(ii)(B), (B), after all, "was written with the constitutional distinctions between picketing and publicity in mind."¹⁹

The court of appeals concluded, nevertheless, that the instant case was distinguishable from these prior decisions for three reasons: (1) that the present dispute involved handbilling, which the court below categorized as "pure

¹⁹ Comment, *Secondary Boycotts and the First Amendment*, 51 U. Chi. L. Rev. 811, 820 (1984), quoting R. DERESHINSKY, A. BERKOWITZ, AND P. MISCIMARRA, *THE NLRB AND SECONDARY BOYCOTTS* 231 (rev. ed. 1981).

speech," rather than picketing which "includes elements in addition to speech" (Pet. App. A, pp. 6a-13a); (2) that, although it did not have to decide the issue, there was a "difficult question" as to whether "speech which urges consumers to engage in a secondary boycott is commercial speech which can be and has been restricted in response to a substantial governmental interest" (Pet. App. A, p. 13a n. 7); and (3) that, if the Union's conduct was not to be "treated like commercial speech," since the statutory regulation "would [then] clearly be content-based," there would be doubt whether the government could "prove a compelling state interest and . . . show that the statute was narrowly drawn to achieve that end" (*id.*). As demonstrated below, none of these contentions have merit.

A. The Regulation Of Unprotected Coercive Secondary Conduct Imposes No Impermissible Restriction Upon Constitutionally Protected Speech

"[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage Co.*, 336 U.S. 490, 502 (1949). Conduct which is "designed not to communicate but to coerce" (*Allied International*, 456 U.S. at 226) may, therefore, be regulated notwithstanding that "such regulation may have an incidental effect on rights of speech and association" (*Claborne*, 458 U.S. at 912).

These principles, as applied to conduct which has the "unlawful objective" of "spread[ing] labor discord by coercing a neutral party to join the fray" (*Safeco*, 447 U.S. at 616), have not been restricted to only those situations where picketing was the chosen means of coercion. They have heretofore been applied equally to both coercive "pure speech" and to picketing. The use of one form of coercion instead of another is a "distinc-

tion without a difference. . . . [T]he Court which rejected First Amendment objections to § 8(b)(4) had 'speech' as well as 'picketing' inducements in mind." *Local Union No. 3, International Brotherhood of Electrical Workers*, 477 F. 2d at 266. There have been, therefore, many different instances where coercive secondary conduct, although absent picketing, has nevertheless been found to be outside the First Amendment's protection.²⁰ Admittedly, in some of these instances the work stoppage used to coerce the secondary employer was a more powerful weapon than the secondary conduct now at issue. The unlawful objective and the controlling regulatory purpose, however, regardless of whether the strategy used is a secondary strike or secondary refusal to patronize, is precisely the same: "to protect from direct business losses persons in various degrees of neutrality . . . [and] to prevent disputes from spreading

²⁰In *United Brotherhood of Carpenters v. Sperry*, 170 F. 2d 863, 869 (10th Cir. 1948), under the predecessor provision to Section 8(b)(4)(ii)(B), the court found that "[t]he promulgation and circulation of a blacklist," as well as picketing, where used to effectuate a secondary boycott, was "not protected by the First Amendment." The same reasoning was applied to work stoppages, although there was no picketing, in *NLRB v. Wine, Liquor & Distillery Workers Union Local 1*, 178 F. 2d 584, 587 (2d Cir. 1949), and, under the present statutory language, to statements by a union business manager that were found to constitute a prohibited work stoppage inducement or encouragement, again notwithstanding the absence of picketing, in *NLRB v. Local Union No. 3, International Brotherhood of Electrical Workers*, 477 F. 2d at 266. Similarly, in *New Orleans Steamship Association v. General Longshore Workers*, 626 F. 2d 455, 462 (5th Cir. 1980), *aff'd. sub. nom. Jacksonville Bulk Terminals v. International Longshoremen's Association*, 457 U.S. 702 (1982), the court concluded that a "work stoppage occasioned only by words is not to be distinguished from one occasioned by a picket line." See, to the same effect, *Allied International*, 456 U.S. at 226 and n. 9, where, although there was no picket line, the Court found that a prohibition of the coercive conduct did not infringe upon the First Amendment.

through the business community." Accordingly, "[w]hile differences of degree may be noted . . . wherever both the considerations have substantial relevance they will furnish sufficient constitutional foundation for outlawing concerted economic pressures." *Cox, Strikes, Picketing and The Constitution*, 4 Vand. L. Rev. 574, 591 (1951).

The critical inquiry turns, therefore, not upon the particular form of secondary coercion utilized, but, rather, on whether that "method or manner of expression, considered in context, justifies the particular restriction." *Safeco*, 477 U.S. at 618 (Stevens, J., concurring). The answer to that question is not predicated, as the court of appeals believed (Pet. App., A., p. 12a), solely on whether the listeners – in this case, the consumers – were restrained or coerced. While it could certainly be found that the on-site handbilling that occurred in this case was inherently coercive of those consumers,²¹ that focus misses the point. Neither *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), nor *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941), the cases relied upon by the decision below (Pet. App. A, p. 12a), support this myopic view. The actions

²¹ It is immaterial that the handbillers did not threaten the consumers with physical harm or violence, or threaten them with economic sanction, or even, based upon the record, "pressur[e] or harass" (Pet. App. A, p. 11a n. 6) the individuals entering the Mall. The on-site handbilling in the present case, similar to "the process of picketing and handbilling" in *Bozhorn's*, "is more than speech. It is a combination of speech and economic or social pressure, an implied threat of ostracism or injury (economic or physical) to those who take the dare. That is why [it] . . . is covered in the first place as threat, coercion, or restraint." 798 F. 2d at 1021 (emphasis in original). This combination of fear, prudence, and social embarrassment inherent in coercive speech extends "beyond the aspect of mere communication as an appeal to reason." *Hughes v. Superior Court*, 339 U.S. 460, 469 (1950). As previously demonstrated (see pp. 14-17, *supra*), handbilling can be as coercive, if not sometimes even more coercive, than picketing.

found in those cases to be outside the First Amendment's protection need not necessarily be coercive of the listener. They are also unlawful where the listener is simply used as a conduit to coerce a nonpresent third party.²²

That same reasoning applies here. The Union utilized the consumers as a conduit to apply economic pressure on the Mall tenants who, it anticipated, would, in turn, act as a conduit to pressure the Mall owner, DeBartolo, to "publicly promise that all construction at the Mall will be done using contractors who pay their employees fair wages and benefits" (J.A. 84a-85a), a euphemism for employing contractors who had collective bargaining agreements with the Union. The Union had no interest in the public refusing to patronize the Mall stores unless those tenants knew that the adverse impact on their businesses was the result of the Union's dispute with High. Only then would the tenants have the requisite incentive to cause DeBartolo to try to remove the source of the Union's discontent. The handbilling, in sum, was an essential and insepara-

²² See, e.g., *Industrial Contractors, Inc.*, 244 NLRB 1154, 1159 (1979) (threat to union officials that employee would be discharged held to violate the Act because the officials were used "as a conduit" for transmission of the statement to the employee); *Walgreen Co.*, 206 NLRB 124 (1973) (request for surveillance and threat made to employee's husband held to violate the Act where the husband was used "as a conduit" to his wife and other employees); and *NLRB v. State Center Warehouse & Cold Storage Co.*, 193 F. 2d 156, 158 (9th Cir. 1951) (threat to housekeeper of company president that employee would be discharged held to violate the Act where the housekeeper "conveyed the message to the employee"). See also *NLRB v. Advertisers Manufacturing Co.*, ___ F. 2d ___, 125 LRRM 3024, 3025 (7th Cir. June 29, 1987) (discharge of supervisor held to violate the Act where done to retaliate for her son's union activity and "to intimidate [protected employee] union supporters"); and *NLRB v. Village IX, Inc.*, 723 F. 2d 1360, 1365 (7th Cir. 1983) (assault of union organizer held to violate the Act because prounion employees could likely infer retaliation).

ble part of an integrated course of Union conduct that was designed to impose impermissible pressure on the secondary employers.²³ As such, the constitutional question is governed by the "well-settled [principle] that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." *California Motor Transport Co.*, 404 U.S. at 508, citing *Giboney*, 336 U.S. at 502. See also *Searle v. Johnson*, 646 P.2d 682, 685 (Utah 1982).

²³One commentator has asserted that, if the Union's conduct is found to have been constitutionally regulated because it constitutes an integral part of an illegal course of conduct, that position would have "two problems. First...the first amendment 'extends to more than abstract discussion, unrelated to action...[it also] means the opportunity to persuade to action, not merely to describe facts.' [quoting *Claiborne*, 458 U.S. at 910, quoting *Thomas v. Collins*, 323 U.S. 516, 537 (1945)]. Second, distinguishing between information that discloses a secondary's participation in or connection with a labor dispute and appeals to consumers to boycott the secondary is not practicable." Goldman, *The First Amendment and Nonpicketing Labor Publicity Under Section 8(b)(4)(ii)(B) of the National Labor Relations Act*, 36 Vand. L. Rev. 1469, 1485 (1983). Neither of these contentions are valid. The initial argument, while correct, is incomplete. It disregards *Claiborne's* recognition that, even if the conduct at issue involves constitutionally protected activity under *Thomas*, that "does not end the relevant constitutional inquiry. Governmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances...[including] [s]econdary boycotts." 458 U.S. at 911-12. The "impracticality" claim is specious; by including a demand that customers not patronize the Mall stores instead of simply stating the Union's disagreement with High and that company's relationship to the Mall employers, the Union intentionally undertook to wage a secondary boycott. It has never contested that fact. J.A. 15a n. 8. In any event, differentiating between coercive and noncoercive union appeals is surely a no more difficult task than those which this Court has previously "entrusted to the Board's expertise." *Safeco*, 447 U.S. at 615 n. 11.

B. The Union's Coercive Conduct Should Be Treated Like Commercial Speech Which Has Been Permissibly Restricted In Response To A Substantial Governmental Interest

1. The Union's Coercive Conduct Should Be Treated Like Commercial Speech

As the court of appeals acknowledged, "in *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748 (1976),... the Court compared labor speech and commercial speech and found 'no satisfactory distinction between the two kinds of speech.' *Id.* at 763." Pet. App. A, pp. 14a-15a n. 7.²⁴ That comparison is still accurate. In both instances the speech is "of an entirely private and economic character." *Virginia State Board*, 425 U.S. at 763 n. 17. Both commercial speech and labor speech also relate "solely to the economic interests of the speaker and his audience" and propose a "commercial transaction." *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. at 561-62. The Union's conduct here, like a commercial advertisement, was "intended to influence consumers' choices among goods and services. To the extent that each is successful, some business, either the business [pressured]... by the union or the advertiser's competition, will suffer a corresponding economic loss."²⁵ The objective of seeking "immediate assistance in putting economic pressure upon one with whom the speaker is engaged in driving a private business bar-

²⁴The decision below did question whether the *Virginia State Board* comparison is proper where the "labor speech does not amount to threats or coercion..." J.A. 15a n. 7. As previously shown (see pp. 14-17, *supra*), however, in this case the Union's conduct was coercive and, accordingly, the distinction posited by the court of appeals is inapposite.

²⁵Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 Yale L.J. 938, 960 (1960).

gain" is thus "readily distinguishable from words looking forward to political action." Cox, 94 Harv. L. Rev. at 39.²⁶ The "broad power to regulate economic activity," such as union "secondary boycotts," is, as this Court emphasized in *Claiborne*, of a totally different nature than the "right to prohibit peaceful political activity such as that found in the boycott" in that case. 458 U.S. at 912-13. The former, in contrast to political speech, does not "rest on the highest rung of First Amendment values." *Id.* at 913, quoting *Carey v. Brown*, 447 U.S. at 455, 467 (1980).²⁷

2. The Union's Coercive Conduct Was Permissibly Restricted In Response To A Substantial Governmental Interest

Where activity akin to commercial speech involves, as in this case, "a lawful activity and is not misleading or fraudulent" (*Posadas de Puerto Rico Associates*, 106 S. Ct. at 2976), the "appropriate inquiry is [then] . . . whether the incidental restrictions on First Amendment freedoms

²⁶ According to the decision below, "a strong argument could be made that the Union in the instant case was expressing social or moral values, as well as economic considerations in its written message." Pet. App. A, p. 14a n. 7. There is no basis for that contention especially where, as here, the Union's message sought to impose a coercive secondary boycott. The Union thereby linked any alleged reference to "social or moral values" with a clearly economic appeal. This combination of messages does not entitle the Union "to the constitutional protection afforded non-commercial speech." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 68 (1963).

²⁷ As this Court indicated in *Ohrlik*, commercial speech receives only a "limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." 436 U.S. at 456. See also *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 n. 5 (1985) ("the most prominent example of reduced [First Amendment] protection . . . concern[s] commercial speech").

are greater than necessary to further a substantial governmental interest." *San Francisco Arts & Athletics, Inc.*, 55 U.S.L.W. at 5064. There are three steps in this analysis: (a) to assess "the strength of the government's interest in restricting the speech"; (b) to determine "whether the challenged restriction 'directly advances' the government's asserted interest"; and (c) to ascertain "whether the restrictions on commercial speech are no more extensive than necessary to serve the government's interest." *Posadas de Puerto Rico Associates*, 106 S. Ct. at 2977-78; *Central Hudson*, 447 U.S. at 566. Section 8(b)(4)(ii)(B), as applied in this case, passes muster under each prong of that test.

a. Congress' interest in preventing the spread of "labor discord by coercing a neutral party to join the fray" (*Safeco*, 447 U.S. at 616) is patently substantial. "Congress 'aimed to restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, widespread, and, as Congress evidently judged, dangerous practice of unions to widen that conflict: the coercion of neutral employers.'" *Allied International*, 456 U.S. at 223 n. 20, quoting *Local 1976, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93, 100 (1958). There is a "strong governmental interest" (*Claiborne*, 458 U.S. at 912) in "preserving [the] economy against the stagnation that could be produced by . . . [union] disruption of the business of employers with whom they have no primary dispute." *American Radio Association v. Mobile Steamship Association, Inc.*, 419 U.S. 217, 231 (1954).²⁸

²⁸ The present case exemplifies the imposition of a "heavy burden on neutral employers" and the "widening of industrial strife" - the very situation "that the secondary boycott provisions [of the Act] were designed to prevent." *Allied International*, 456 U.S. at 223. The Union's dispute with High was extended to not only Wilson's, but to DeBartolo and more than eighty other Mall tenants, none of whom "sell any products whose chain of produc-

(Footnote continued on the following page)

b. "[T]he concern that motivates all of Section 8(b) 8(b)(4)," as this Court emphasized in *DeBartolo I*, is to insulate neutral employers from the devastating effects of a secondary boycott. 463 U.S. at 155-56. Section 8(b)(4) does not contain a "sweeping prohibition" nor "speak generally of secondary boycotts" but, conversely, "describes and condemns specific union conduct directed to specific objectives." *Local 1976, United Brotherhood of Carpenters*, 357 U.S. at 98. This "striking of the delicate balance" (*Claiborne*, 458 U.S. at 912; *Safeco*, 447 U.S. at 617 (Blackmun, J., concurring)) demonstrates that the prohibition here directly advances Congress' substantial interest. The legislative "accommodation" achieved only after "careful and continued consideration" (*Tree Fruits*, 377 U.S. at 93 (Harlan and Stewart, J.J., dissenting)) is a "reasonable one" (*Posadas de Puerto Rico Associates*, 106 S. Ct. at 2977) which fully satisfies the second step of the *Central Hudson* analysis.

c. The restriction imposed upon the Union is also no more extensive than necessary to serve the government's interest. Any non-coercive publicity, such as an informational handbill which does not urge a secondary boycott but only informs the public of the facts involved in a labor dispute, is not proscribed by the Act. Congress even allowed some coercive secondary activity: picketing directed at a struck product as sanctioned by *Tree Fruits* and *Safeco* or nonpicketing publicity which falls within the proviso's

28 (Continued)

tion can reasonably be said to include High." *DeBartolo I*, 463 U.S. at 157. This extension of the primary dispute will also necessarily have a corollary impact upon the numerous other companies with whom those employers do business. The conflict has thus been widened to injure innumerable "unoffending employers and others" whom Congress sought to shield from "pressures in controversies not their own." *Denver Building & Constructing Trades Council*, 341 U.S. at 692.

exception. The Union here, for example, was free to picket High, coercively handbill High and Wilson's or use numerous non-coercive means to publicize its dispute. The availability of these alternative means of communication are a "relevant factor" where, as here, this Court is "called upon to balance First Amendment rights against [legitimate] governmental . . . interests." *Pell v. Procunier*, 417 U.S. 817, 824 (1974). See also *Tree Fruits*, 377 U.S. at 93 (Harlan and Stewart, J.J., dissenting). The Act's prohibitions are thus "narrowly drawn" (*Central Hudson*, 447 U.S. at 565) to address only "isolated evils" (*Tree Fruits*, 377 U.S. at 71) and are "not broader than Congress reasonably could have determined to be necessary to further . . . [its] interests" (*San Francisco Arts & Athletics, Inc.*, 55 U.S.L.W. at 5065).

3. *Organization For A Better Austin v. Keefe*, 402 U.S. 415 (1971), Is Inapplicable

The decision below placed considerable emphasis on *Keefe*. Its reliance on that opinion is, as the foregoing discussion makes clear, misplaced. First, even if *Keefe* can be read, as did the court of appeals (Pet. App. A, p. 7a), to infer that "the distribution of handbills is generally fully protected by the First Amendment," that "presence of protected activity" does not, as previously noted, "end the relevant constitutional inquiry." *Claiborne*, 458 U.S. at 912. The protected conduct may still be curtailed or even prohibited where, as here, there is a justifiable governmental interest. *Id.* Second, *Keefe* involved "speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection'" rather than "speech on matters of purely private concern which is of less First Amendment concern." *Dun & Bradstreet*, 472 U.S. at 758-59, 760. The "blockbusting" or "panic peddling" tactics in a racially integrated neighborhood, the subject of the handbill in *Keefe*, like its counterpart activities in *Claiborne*, involved a "politically motivated boycott designed to force

governmental and economic change and to effectuate rights guaranteed by the Constitution" as opposed to, as in this case, "a boycott organized for economic ends." *Claiborne*, 458 U.S. at 910, 913-15. *Third*, here the countervailing value to the asserted right to publicize a position is not, as it was in *Keefe*, merely a businessman's privacy interest in avoiding embarrassment as the result of the distribution of leaflets at a primary location which were critical of his business practices. Instead, it is the broader public interest of minimizing the disruption to interstate commerce necessarily occasioned by the coercion of neutral employers at a secondary situs. *Finally*, unlike *Keefe*, where virtually all communication was suppressed (402 U.S. at 417), as demonstrated above, the Union here had a plethora of methods to permissibly communicate its message.

C. Regulation Of The The Union's Coercive Conduct Does Not Constitute An Impermissible Restriction Of Content-Based Speech

The court of appeals was also concerned that, "when the government has regulated a particular message, without regard to whether the expression consists of speech or speech plus conduct . . . it is normally necessary for the government to prove a compelling state interest and for the government to show that the statute was narrowly drawn to achieve that end." Pet. App. A, p. 13a n. 7. That concern was unfounded. The offensive conduct here was, as discussed above, the Union's integrated course of conduct designed to economically pressure the secondary employers. Only that "speech plus conduct," not the "speech" itself, was proscribed.

Moreover, as previously shown, the regulation in this case does further "an important or substantial governmental interest . . . unrelated to the suppression of free expression [in which] the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391

U.S. at 377. Accordingly, even if the Union's conduct is for some reason not equated to commercial speech, any arguable content-based restriction was permissible under the "compelling interest" standard. That same conclusion was, in fact, that reached by this Court with respect to the "content-based restriction" in *Safeco*. 447 U.S. at 618 (Stevens, J., concurring); see also *id.* at 617 (Blackmun, concurring). It is the same conclusion which should be reached, if need be, in this case.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the judgment of the court of appeals be reversed and that this case be remanded to that court with instructions to deny the Union's petition for review and to enforce the order of the Board.

Respectfully submitted,

LAWRENCE M. COHEN

MARTIN K. DENIS

FOX & GROVE, CHARTERED

233 South Wacker Drive

Sears Tower - Suite 7818

Chicago, Illinois 60606

312 / 876-0500

Attorneys for Petitioner

RESPONDENT'S BRIEF

No. 86-1461

9

Supreme Court, U.S.
FILED
AUG 21 1987

In the Supreme Court of the United States

OCTOBER TERM, 1987

EDWARD J. DEBARTOLO CORP., PETITIONER

v.

FLORIDA GULF COAST BUILDING
AND CONSTRUCTION TRADES COUNCIL
AND NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD
AS RESPONDENT SUPPORTING PETITIONER

CHARLES FRIED
Solicitor General

LOUIS R. COHEN
Deputy Solicitor General

GLEN D. NAGER
Assistant to the Solicitor General

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney
National Labor Relations Board
Washington, D.C. 20570

56 p

QUESTIONS PRESENTED

1. Whether respondent union's distribution of handbills at a shopping mall urging a total consumer boycott of retail establishments with which the union had no primary labor dispute "threaten[ed], coerce[d], or restrain[ed]" those establishments within the meaning of Section 8(b) (4) (ii) (B) of the National Labor Relations Act, 29 U.S.C. 158(b) (4) (ii) (B).

2. Whether Section 8(b) (4) (ii) (B) of the NLRA, as applied to respondent union's distribution of handbills urging a total consumer boycott of those establishments, contravenes the First Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Summary of argument	10
Argument	14
I. A union "threatens, coerces, or restrains" a neutral employer within the meaning of Section 8(b) (4) (ii) (B) when it distributes handbills urging a total consumer boycott of a neutral employer's business	14
A. The statutory phrase "threaten, coerce, or restrain" encompasses handbilling urging a total consumer boycott of a secondary employer	15
B. Notwithstanding <i>Catholic Bishop</i> , the text and legislative history of Section 8(b) (4) (ii) (B) do not permit the construction the court of appeals reached	21
II. Section 8(b) (4) (ii) (b), as applied to respondent's handbilling in this case, does not violate the first amendment	33
Conclusion	46
Appendix	1a

TABLE OF AUTHORITIES

Cases:

<i>Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc.</i> , 391 U.S. 308 (1968), overruled <i>sub nom. Hudgens v. NLRB</i> , 474 U.S. 507 (1976)	36
---	----

IV

Cases—Continued:

Page

<i>Amalgamated Packinghouse Workers (Packerland Packing Co.)</i> , 218 N.L.R.B. 853 (1975)	43
<i>American Federation of Television and Radio Artists (Great Western Broadcasting Corp.)</i> , 150 N.L.R.B. 467 (1964), aff'd sub nom. <i>Great Western Broadcasting Corp. v. NLRB</i> , 356 F.2d 434 (9th Cir.), cert. denied, 384 U.S. 1002 (1966)....	20
<i>Babbit v. Farm Workers</i> , 442 U.S. 289 (1979).....	36
<i>Bakery & Pastry Drivers v. Wohl</i> , 315 U.S. 769 (1942)	35
<i>Bates v. State Bar</i> , 433 U.S. 350 (1977)	37, 38
<i>Bolger v. Youngs Drug Product Corp.</i> , 463 U.S. 60 (1983)	41
<i>Boxhorn's Big Muskego Gun Club, Inc. v. Electrical Workers, Local 494</i> , 798 F.2d 1016 (7th Cir. 1986)	17, 24, 36
<i>Carey v. Brown</i> , 447 U.S. 455 (1980)	36, 40
<i>Carpenters v. NLRB</i> , 357 U.S. 93 (1958)	42
<i>Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n</i> , 447 U.S. 557 (1980)	37, 38, 41, 44
<i>City of Renton v. Playtime Theatres, Inc.</i> , No. 84-1360 (Feb. 25, 1986)	44
<i>Cousins Associates, Inc.</i> , 125 N.L.R.B. 73 (1959), enforced, 283 F.2d 242 (2d Cir. 1960)	15
<i>Crowell v. Benson</i> , 285 U.S. 22 (1932)	22, 33
<i>Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.</i> , 472 U.S. 749 (1985)	37
<i>Edward J. DeBartolo Corp. v. NLRB</i> , 662 F.2d 264 (4th Cir. 1981), aff'g, 252 N.L.R.B. 702 (1980), vacated and remanded, 463 U.S. 147 (1983) ..2, 3, 5, 14, 22, 23, 33	
<i>Electrical Workers v. NLRB</i> , 341 U.S. 694 (1951) ..	33
<i>FCC v. Pacifica Foundation</i> , 438 U.S. 726 (1978) ..	37
<i>First National Bank v. Bellotti</i> , 435 U.S. 765 (1978)	36
<i>Florida Gulf Coast Building Trades Council v. Debartolo Corp.</i> , 106 L.R.R.M. 2310 (Fla. Dist. Ct. of App. 1980)	4
<i>Ford Motor Co. v. NLRB</i> , 441 U.S. 448 (1979)....	21
<i>Friedman v. Rogers</i> , 440 U.S. 1 (1979)	37
<i>F.W. Woolworth Co.</i> , 101 N.L.R.B. 1457 (1952)....	15

V

Cases—Continued:

Page

<i>George Moore Ice Cream Co. v. Rose</i> , 289 U.S. 373 (1933)	33
<i>Giboney v. Empire Storage & Ice Co.</i> , 336 U.S. 490 (1949)	42
<i>Globe Products Corp.</i> , 102 N.L.R.B. 278 (1953)....	15
<i>Honolulu Typographical Union No. 37 (Hawaii Press Newspaper, Inc.)</i> , 167 N.L.R.B. 1030 (1967), enforced, 401 F.2d 952 (D.C. Cir. 1968)	20
<i>Hospital and Service Employees Union, Local 339 (Delta Air Lines, Inc.)</i> , 263 N.L.R.B. 996 (1982), remanded, 743 F.2d 1417 (9th Cir. 1984)	21
<i>Hotel & Restaurant Employees' International Alliance, Local 122 v. Wisconsin Employment Relations Board</i> , 315 U.S. 437 (1942)	35
<i>Hughes v. Superior Court</i> , 339 U.S. 460 (1950)....	45
<i>International Ass'n of Machinists, Lodge 942 (Alloy Mfg. Co.)</i> , 119 N.L.R.B. 307 (1957), enforcement denied, 263 F.2d 796 (9th Cir. 1959)	16, 19
<i>International Brotherhood of Electrical Workers, Local No. 278 (Kelinske Elec. Co.)</i> , 232 N.L.R.B. 1044 (1977)	43
<i>Local 822, Radio and Television Engineers (Middle South Broadcasting)</i> , 133 N.L.R.B. 1698 (1961) ..	18
<i>Local No. P-9, United Food and Commercial Workers Union (Geo. A. Hormel Co.)</i> , 281 N.L.R.B. No. 135 (Feb. 26, 1986)	21
<i>Local Union No. 54, Sheet Metal Workers (Sakowitz, Inc.)</i> , 174 N.L.R.B. 362 (1969)	43
<i>Longshoremen Ass'n v. Allied International, Inc.</i> , 456 U.S. 212 (1982)	39, 40, 42
<i>Metromedia, Inc. v. San Diego</i> , 453 U.S. 490 (1981)	41, 42
<i>Milk Wagon Drivers' Union, Local 753 v. Meadowmoor Dairies</i> , 312 U.S. 287 (1941)	35
<i>NAACP v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982)	7, 40, 44, 45
<i>National Union of Marine Cooks and Stewards, C.I.O.</i> , 92 N.L.R.B. 877 (1950)	16

VI

Cases—Continued:

Page

<i>National Woodwork Mfrs. Ass'n v. NLRB</i> , 386 U.S. 612 (1967)	31
<i>NLRB v. Catholic Bishop</i> , 440 U.S. 490 (1979)	7, 11, 21, 22
<i>NLRB v. Denver Building Construction Trades Council</i> , 341 U.S. 675 (1951)	23, 42
<i>NLRB v. Drivers Local 693 (Curtis Bros.)</i> , 362 U.S. 274 (1960)	19
<i>NLRB v. Fruit & Vegetable Packers, Local 760</i> , 377 U.S. 58 (1964)	10, 16, 18, 22, 23, 24, 26, 27, 32, 35, 40
<i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 575 (1969) ..	38
<i>NLRB v. International Ass'n of Machinists, Lodge 942</i> , 263 F.2d 796 (9th Cir. 1959)	19
<i>NLRB v. Operating Engineers</i> , 400 U.S. 297 (1971)	38
<i>NLRB v. Retail Store Employees Union, Local 1001</i> , 447 U.S. 607 (1980)	7, 10, 14, 17, 18, 21, 33, 35, 40, 42, 43, 45
<i>NLRB v. Servette</i> , 377 U.S. 46 (1964)	23, 24
<i>NLRB v. United Rubber Workers (O'Sullivan Rubber Corp.)</i> , 269 F.2d 694 (4th Cir. 1959), rev'd, 363 U.S. 329 (1960)	16, 19
<i>Ohralik v. Ohio State Bar Ass'n</i> , 436 U.S. 477 (1978)	36, 37, 38
<i>Organization for a Better Austin v. Keefe</i> , 402 U.S. 415 (1971)	7, 40, 44, 45
<i>Pacific American Shipowners Ass'n</i> , 98 N.L.R.B. 582 (1952)	15
<i>Pattern Makers' League v. NLRB</i> , 473 U.S. 95 (1985)	21
<i>Posadas de Puerto Rico Associates v. Tourism Co.</i> , No. 84-1903 (July 1, 1986)	37, 41, 42
<i>Radio Broadcast Technicians, Local Union No. 1264 (WKRG-TV, Inc.)</i> , 123 N.L.R.B. 507 (1959)	26
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984)	40
<i>Teamsters Union v. Voght Inc.</i> , 354 U.S. 284 (1957)	45

VII

Cases—Continued:

Page

<i>United States v. O'Brien</i> , 391 U.S. 367 (1968)	41
<i>Virginia Pharmacy Bd. v. Virginia Consumer Council</i> , 425 U.S. 748 (1976)	37, 38, 39, 40, 41
<i>Woelke & Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982)	30
<i>Young v. American Mini Theatres, Inc.</i> , 427 U.S. 50 (1976)	37
<i>Yu Cong Eng v. Trinidad</i> , 271 U.S. 500 (1926)	33
<i>Zauderer v. Office of Disciplinary Counsel</i> , 471 U.S. 626 (1985)	41

Constitution, statutes and regulations:

U.S. Const. Amend. I	<i>passim</i>
National Labor Relations Act, 29 U.S.C. (& Supp. III) 151 <i>et seq.</i> :	
§ 8(a) (1), 29 U.S.C. 158(a) (1)	15, 25
§ 8(b) (1), 29 U.S.C. 158(b) (1)	15, 25
§ 8(b) (1) (A), 29 U.S.C. 158(b) (1) (A)	19
§ 8(b) (4), 29 U.S.C. 158(b) (4)	4, 9, 14, 19, 24, 25, 26, 42
§ 8(b) (4) (ii) (B), 29 U.S.C. 158(b) (4) (ii) (B)	<i>passim</i>
Taft Hartley Act, ch. 120, § 8(b) (4), 61 Stat. 141 ..	24, 25

Miscellaneous:

105 Cong. Rec. (1959):

pp. 1567-1568	25
pp. 6231-6232	26
p. 14348	19
pp. 14540-14541	27
p. 15520	19
p. 15532	26
pp. 15672-15673	27
pp. 15855-15856	19
p. 15942	27
p. 15965	27
pp. 16254-16255	29
p. 16419	30
p. 16423	30

VIII

Miscellaneous—Continued:

Page

p. 16588	27
p. 16591	27
pp. 17325-17327	27, 28
p. 17328	28
p. 17333	28
p. 17334	28
pp. 17878-17899	28
pp. 17919-17920	31
pp. 18021-18022	31, 32
p. 18133	29
pp. 18705-18706	31
p. 19771	30
<i>Cox, Strikes, Picketing And The Constitution</i> , 4 Vand. L. Rev. 574 (1951)	17
<i>Cox, The Supreme Court 1979 Term—Foreward: Freedom Of Expression in the Burger Court</i> , 94 Harv. L. Rev. 1 (1980)	39, 40, 45
<i>Goldman, The First Amendment and Nonpicketing Labor Publicity Under Section 8(b)(4)(ii)(B) of the National Labor Relations Act</i> , 36 Vand. L. Rev. 1469 (1983)	8
<i>Gregory, Constitutional Limitations On The Regu- lation of Union And Employer Conduct</i> , 49 Mich. L. Rev. 191 (1950)	18
H.R. Rep. 1147, 86th Cong., 1st Sess. (1959)	19, 32
<i>Labor-Management Reform Legislation: Hearings on S. 505 et al., Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Wel- fare</i> , 86th Cong., 1st Sess. (1959)	25
I NLRB, <i>Legislative History of the Labor- Management Reporting and Disclosure Act of 1959</i> (1959):	
Vol. 1 (1959)	19, 24, 26
Vol. 2 (1959)	19, 24, 25, 26, 27, 28, 29, 30, 31, 32
S. 748, 86th Cong., 1st Sess. (1959)	24
S. 1555, 86th Cong., 1st Sess. (1959)	26

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1461

EDWARD J. DEBARTOLO CORP., PETITIONER

v.

FLORIDA GULF COAST BUILDING
AND CONSTRUCTION TRADES COUNCIL
AND NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD
AS RESPONDENT SUPPORTING PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 796 F.2d 1328. The supplemental decision and order of the National Labor Relations Board (Pet. App. 38a-46a) is reported at 273 N.L.R.B. 1431. The case was previously before this Court in *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147 (1983), which vacated and remanded for further consideration the decision of the Court of Appeals for the Fourth Circuit, 662 F.2d 264 (1981), which had affirmed an initial decision of the National Labor Relations Board, 252 N.L.R.B. 702 (1980).

JURISDICTION

The judgment of the court of appeals (Pet. App. 47a-48a) was entered on August 11, 1986. A timely petition

for rehearing was denied on November 12, 1986 (Pet. App. 49a-50a). On January 28, 1987, Justice Powell extended the time for filing a petition for a writ of certiorari to and including March 11, 1987 (Pet. App. 51a), and the petition was filed on that date. On June 6, 1987, the Court issued a writ of certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(b)(4)(ii)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(ii)(B), is reprinted in the Appendix to this brief.

STATEMENT

1. The facts of this case have been stipulated by the parties (J.A. 19a-27a) and are detailed in this Court's opinion in *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147, 148-153 (1983) (*DeBartolo I*). Petitioner, the Edward J. DeBartolo Corp., owns and operates the East Lake Square Mall, a large shopping mall in Tampa, Florida (463 U.S. at 149). In August 1979, petitioner leased to the H.J. Wilson Company (Wilson) a plot of land abutting the mall on which Wilson agreed to construct and operate a department store that would become part of the already operating mall (J.A. 23a). Wilson retained the H.J. High Construction Company (High) to build the store (*ibid.*). High, however, subsequently became involved in a primary labor dispute with respondent union, the Florida Gulf Coast Building and Construction Trades Council, AFL-CIO, over High's payment of allegedly substandard wages and benefits to the employees involved in the construction of Wilson's store (463 U.S. at 150). While neither petitioner nor any of the mall's approximately 85 other retail tenants had any right to control the manner in which High discharged its contractual obligation to Wilson (*id.* at 149-150; J.A. 23a-24a),¹ respondent

¹ High had no contract or other business relationship with petitioner or with any mall tenant other than Wilson (J.A. 23a-24a).

ent union nevertheless began distributing handbills at all four entrances of the mall complaining about petitioner's tolerance of High's substandard compensation practices (463 U.S. at 150).² Among other things, the union asked in these handbills that consumers "not patronize the stores in the East Lake Square Mall until the Mall's owner publicly promises that all construction at the Mall will be done using contractors who pay their employees fair wages and fringe benefits" (*id.* at 150 & n.3).³

² The handbilling was done in an orderly manner, lasted for about three weeks, and was not accompanied by any picketing or patrolling (*DeBartolo I*, 463 U.S. at 150; J.A. 24a-25a).

³ The handbills stated (Pet. App. 40a-41a) in full:

PLEASE DON'T SHOP AT EAST LAKE SQUARE MALL
PLEASE

The FLA. GULF COAST BUILDING TRADES COUNCIL, AFL-CIO is requesting that you do not shop at the stores in the East Lake Square Mall because of The Mall ownership's contribution to substandard wages.

The Wilson's Department Store under construction on these premises is being built by contractors who pay substandard wages and fringe benefits. In the past, the Mall's owner, The Edward J. DeBartolo Corporation, has supported labor and our local economy insuring that the Mall and its stores be built by contractors who pay fair wages and fringe benefits. Now, however, and for no apparent reason, the Mall owners have taken a giant step backwards by permitting our standards to be torn down. The payment of substandard wages not only diminishes the working person's ability to purchase with earned, rather than borrowed, dollars, but it also undercuts the wage standard of the entire community. Since low construction wages at this time of inflation means decreased purchasing power, do the owners of East Lake Mall intend to compensate for the decreased purchasing power of workers of the community by encouraging the stores in East Lake Mall to cut their prices and lower their profits?

CUT-RATE WAGES ARE NOT FAIR UNLESS MERCHANDISE PRICES ARE ALSO CUT-RATE.

We ask for your support in our protest against substandard wages. Please do not patronize the stores in the East Lake

Petitioner demanded that the union modify the handbills to make clear that the labor dispute did not involve petitioner or any mall tenant other than Wilson and that the union limit its activity to the immediate vicinity of Wilson's construction site (or to places where public roads intersect and lead to petitioner's property) (463 U.S. at 151; J.A. 25a, 87a-88a). The union, however, persisted in distributing the handbills without regard to these limitations (463 U.S. at 151). Petitioner then filed an unfair labor practice charge with the National Labor Relations Board (NLRB) (*ibid.*).⁴

The General Counsel issued a complaint alleging that respondent union's handbilling violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(b)(4)(ii)(B), in that it "threaten[ed], coerce[d], or restrain[ed]" the mall tenants "to cease doing business" with petitioner in order to force petitioner or Wilson not to do business with High (463 U.S. at 151; J.A. 6a-11a). The NLRB, without deciding whether the handbilling constituted a form of "threat," "coercion," or "restraint" proscribed by Section 8(b)(4)(ii)(B), held (see 463 U.S. at 151-152) that the union's handbilling was protected by the "publicity proviso" to Section 8(b)(4) and that the complaint should therefore be dis-

Square Mall until the Mall's owner publicly promises that all construction at the Mall will be done using contractors who pay their employees fair wages and fringe benefits.

IF YOU MUST ENTER THE MALL TO DO BUSINESS, please express to the store managers your concern over substandard wages and your support of our efforts.

We are appealing only to the public—the consumer. We are not seeking to induce any person to cease work or to refuse to make deliveries.

⁴ Petitioner also filed a trespass action in state court and obtained an injunction against the handbilling. See J.A. 25; see also *Florida Gulf Coast Building Trades Council v. DeBartolo Corp.*, 106 L.R.R.M. 2310 (Fla. Dist. Ct. of App. 1980). No issue concerning the trespass action is before this Court.

missed. The NLRB reasoned that petitioner and its tenants, including Wilson, would all derive a substantial benefit from the "product" that High was constructing, namely Wilson's store, and, accordingly, that this consumer publicity was directed at a "producer" within the meaning of the proviso. See *Florida Gulf Coast Building Trades Council (Edward J. DeBartolo Corp.)*, 252 N.L.R.B. 702, 705 (1980). The Fourth Circuit affirmed (*Edward J. DeBartolo Corp. v. NLRB*, 662 F.2d 264 (1981)), but this Court reversed that judgment (*DeBartolo I*, 463 U.S. 147 (1983)).

The Court in *DeBartolo I* identified the critical question as "whether the handbilling 'advis[ed] the public * * * that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer'" (463 U.S. at 154). The Court said that the NLRB had "not [found] that any product produced by High was being distributed by [petitioner] or any of Wilson's cotenants" and had instead "relied on the theory that there was a symbiotic relationship between them and Wilson[]" (*id.* at 156). The Court rejected this theory of the publicity proviso, finding that it "would almost strip the distribution requirement of its limiting effect" and that, "if Congress had intended all peaceful, truthful handbilling that informs the public of a primary dispute to fall within the proviso, the statute would not have contained a distribution requirement" (*ibid.* (footnote omitted)). The Court remanded the case to the NLRB to determine whether the union's handbilling violated Section 8(b)(4)(ii)(B) apart from the publicity proviso; and it declined to decide whether a ban on such handbilling would violate the First Amendment until this statutory question had been resolved (463 U.S. at 156-158).

2. On remand, the NLRB found (Pet. App. 38a-46a) that the handbilling violated Section 8(b)(4)(ii)(B). It determined that "[r]espondent [union], * * * by distributing handbills requesting the public not to patronize

mall tenants because High allegedly pays substandard wages and fringe benefits to its employees constructing a store for Wilson's, coerced the mall tenants" (Pet. App. 42a), reasoning that "[a]ppealing to the public not to patronize secondary employers is an attempt to inflict economic harm on the secondary employers by causing them to lose business" and that, as explained in its prior cases, "such appeals constitute 'economic retaliation' and are therefore a form of coercion" (*id.* at 42a n.6). The NLRB noted (*id.* at 42a n.8) that respondent union had "asked customers to forgo shopping at the mall entirely; it did not merely ask them not to deal with High," and thus its conduct did "not fall within the privilege to engage in product boycotts recognized in *NLRB v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58 (1964)." It then determined that "an object of the * * * [union's] conduct was to force the mall tenants to cease doing business with [petitioner] in order to force [petitioner] and/or Wilson's not to do business with High" (Pet. App. 42a (footnote omitted)). Finally, it rejected the union's contention "that the first amendment protects its handbilling and * * * that * * * the complaint [should be dismissed] in order to avoid a conflict with the Constitution" (*id.* at 42a-43a), reasoning that "the statute's literal language and the applicable case law require that we find a violation[,] and that, 'as a Congressionally created administrative agency[,] we will presume the constitutionality of the Act we administer.'" It therefore issued an order directing respondent union to cease and desist from distributing handbills and to post an appropriate notice (*id.* at 44a-45a).

3. On appeal, the Eleventh Circuit denied enforcement of the NLRB's order (Pet. App. 1a-37a). The court noted that "this case arises out of an entirely peaceful and orderly distribution of a written message, rather than picketing," and that "[n]either the courts nor the NLRB has directly considered the constitutionality of restricting nonpicketing union publicity" (*id.* at 4a (citation

omitted)). Quoting (*id.* at 5a) this Court's statement in *NLRB v. Catholic Bishop*, 440 U.S. 490, 500 (1979), that "'an Act of Congress [should] not be construed to violate the Constitution if any other possible construction remains available,'" the court below concluded (Pet. App. 5a-6a (citation omitted)) that if "the statutory interpretation suggested by the [NLRB] would cause serious doubts about the constitutionality of [Section] 8 (b) (4)," an "'affirmative intention of the Congress clearly expressed' to restrict such handbilling" would have to be found in order to sustain the NLRB's interpretation.

The court found that applying Section 8(b) (4) (ii) (B) to the union's handbilling would raise such a serious constitutional question (Pet. App. 6a-14a). It said that "the distribution of handbills is generally fully protected by the First Amendment" (*id.* at 7a, citing *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971)) and that "'[s]peech does not lose its protected character * * * simply because it may embarrass others or coerce them into action'" (Pet. App. 7a, quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982)). The court acknowledged that restrictions on secondary boycotts and picketing by labor unions have been held constitutional by this Court (Pet. App. 7a, citing *NAACP v. Claiborne Hardware Co.*, *supra*, and *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607 (1980) (*Safeco*)), but it attributed those holdings to "the settled principle that labor picketing is entitled to less First Amendment protection than pure speech" (Pet. App. 7a). It then reiterated that "[t]he handbilling in the instant case was peaceful and orderly" and "involved none of the non-speech elements, *e.g.*, patrolling, which justify restrictions on picketing" (*id.* at 10a-11a (footnote omitted)); it emphasized that "[t]he handbills left the recipients completely free to act in agreement with the ideas presented or to refuse to do so" (*id.* at 11a), and that "the Union was not seeking to have the consumers, the mall tenants, or [petitioner] and/or Wilson's do anything

which would be illegal" (*id.* at 13a).⁵ The court thus concluded that, "[i]n light of the absence of the non-speech elements which have permitted restrictions on labor picketing and in light of the full First Amendment protection afforded to handbilling and pamphleteering," "if [Section] 8(b)(4)(ii)(B) is construed to prohibit [this] * * * handbilling, serious constitutional questions will arise" (*ibid.* (footnote omitted)).⁶

On this premise, the court turned to "the statute and its legislative history in order to identify 'the affirmative intention of the Congress clearly expressed' to prohibit such speech" (Pet. App. 13a-14a). But, while conceding that Section 8(b)(4)(ii)(B)'s "prohibition against threatening, coercing, or restraining could be read very broadly," it concluded that "[t]he language of the statute contains no clear expression of an affirmative intent of

⁵ The court explained (Pet. App. 13a) that "[t]he consumers were legally free to agree with the Union's position and decline to patronize the mall tenants. The mall tenants would have been acting equally legally if, in response to the consumer pressure, they requested that [petitioner] and/or Wilson's request that High use union labor. In the same way, Wilson's and/or [petitioner] would have been within the law if they requested High to accede to the Union's demands regarding terms and conditions of employment."

⁶ The court refused to decide whether "speech which urges consumers to engage in a secondary boycott is commercial speech which can be and has been restricted in response to a substantial governmental interest" (Pet. App. 14a n.7). It noted, however, that "[i]t is not clear that the handbills involved in the instant case are commercial speech or should be treated as commercial speech" since "a strong argument could be made that the Union * * * was expressing social and moral values[] as well as economic considerations in its written message" (*ibid.*), that "the Court has yet to include economic or labor speech in [the commercial speech] category" (*ibid.*), and that "[i]t has been suggested that non-picketing labor publicity is not commercial speech and should not be treated like commercial speech * * *" (*id.* at 15a n.7, citing *Goldman, The First Amendment and Nonpicketing Labor Publicity Under Section 8(b)(4)(ii)(B) of the National Labor Relations Act*, 36 Vand. L. Rev. 1469, 1490 (1983)).

Congress to prohibit the distribution of handbills urging a secondary boycott" (Pet. App. 15a). And it reached the same conclusion with respect to the legislative history, stating (*id.* at 18a-19a) that "the proponents of the [1959] amendments to [Section] 8(b)(4) had in mind non-consumer picketing and more direct economic actions, *e.g.*, strikes, when they proposed to amend that section by making its restriction apply to [actions that] 'threaten, coerce, or restrain,'" and stating (*id.* at 19a) that "[t]here is no indication that they intended to restrict distribution of publicity to consumers."

The court acknowledged that several proponents of the 1959 amendments to the secondary boycott provisions of the statute proposed that union publicity directed toward customers of secondary employers be restricted (Pet. App. 19a-24a). But it said that the proponents "had in mind only prohibiting consumer picketing" (*id.* at 23a) and that "[t]he only suggestion in either house of Congress that the proposed amendments to [Section] 8(b)(4) would apply to nonpicketing labor publicity came from opponents of the amendments" (*id.* at 24a), persons whose views, the court said, cannot be "controlling" (*ibid.*). And it noted that, "[i]n response to the fears of the[se] opponents of the amendments to [Section] 8(b)(4), the conference committee drafted the publicity proviso to [Section] 8(b)(4), which protects union appeals made through handbilling, advertising, and other nonpicketing publicity to consumers not to deal with a secondary employer who has a 'producer-distributor' relationship with a primary employer" (*id.* at 25a). It rejected the argument that, "if Congress had not intended to restrict nonpicketing publicity under [Section] 8(b)(4)(ii)(B), it would not have drafted the publicity proviso" (*id.* at 26a),⁷ stating that

⁷ In response to the contention that rejection of this argument deprived the publicity proviso of "substantial practical effect" and thus conflicted with this Court's decision in *DeBartolo I*, the court said (Pet. App. 32a-33a n.19): "The proviso was not designed to restrict communicative activity; only the prohibitions of [Section]

"the publicity proviso was inserted * * * to allay the fears of the opponents of the amendments that such speech would be restricted" (*ibid.*), that the conference committee's "summary analysis explains that the publicity proviso is a clarification of the fact that the prohibition was never intended to apply to nonpicketing publicity" (*id.* at 30a), and that "[t]he fact that the publicity proviso says 'nothing * * * shall be construed to prohibit publicity' indicates that this proviso only explains how the prohibition of the statute should be interpreted rather than creating an exception to the prohibitions contained in the statute" (*id.* at 32a (emphasis in original)).⁸

In sum, the court could not "find any indication that the entirely peaceful and orderly distribution of handbills, as in the instant case, was intended to be proscribed by Congress" (Pet. App. 37a). It therefore "appl[ied] the rule of *Catholic Bishop*" and denied enforcement of the NLRB's order (*ibid.*).

SUMMARY OF ARGUMENT

I. In *NLRB v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58 (1964) (*Tree Fruits*), and *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607 (1980) (*Safeco*), this Court interpreted the phrase "threaten,

8(b)(4) were intended to do so" and, "[a]lthough[] under our narrow construction of the prohibitions set out in [Section] 8(b)(4), handbilling is not restricted, the portions of the amendments to [Section] 8(b)(4) which restrict communicative activity continue to have substantial practical effect—they regulate picketing, strikes, threats to employers, etc."

⁸ In this regard, the court compared (Pet. App. 30a-31a n.17, 31a-32a) the publicity proviso to the primary activity proviso of Section 8(b)(4)(ii)(B), which states "[t]hat nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing" (29 U.S.C. 158(b)(4)(ii)(B)). The court concluded that, "[t]hus, one of [Section] 8(b)(4)'s provisos was certainly not drafted as an exception, but rather as an explanation of Congress' intent not to reach such conduct by its prohibition" (Pet. App. 31a n.17).

coerce, or restrain," as that phrase is used in Section 8(b)(4)(ii)(B), to encompass peaceful picketing that asks consumers to cease all trading with a neutral employer. Such picketing is coercive of the neutral because the response for which it calls is a total boycott that will threaten the neutral employer with ruin or substantial loss.

Nonpicketing publicity, such as handbilling or the circulation of employer blacklists, may be equally coercive of the neutral employer. The coercion arises from the threat of a total consumer boycott, regardless of whether the threat comes from picketing, or handbilling, or otherwise. The NLRB has therefore consistently found handbilling and other nonpicketing publicity calling for a total consumer boycott of a neutral employer coercive and, unless the publicity proviso is applicable, violative of Section 8(b)(4)(ii)(B).

The court below did not dispute the reasoning that led the NLRB to find that respondent union's handbilling was "coercive" within the meaning of Section 8(b)(4)(ii)(B). Rather, it said, citing *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979), that an Act of Congress should be construed so as not to violate the Constitution if another construction is fairly possible, and it therefore construed the statute not to prohibit nonpicketing publicity (such as handbilling) under *any* circumstances. But the language and legislative history of the statute do not permit this construction.

The phrase "threaten, coerce, or restrain" must be read together with the "publicity proviso"; the proviso exempts only "publicity, other than picketing," and does so only when such publicity satisfies three qualifying conditions, *viz.*, that it be truthful, that it advise the public of a producer/distributor relationship between the primary and secondary employers, and that it not result in an interference with deliveries or a work stoppage at the neutral employer's premises. Construing Section 8(b)(4)(ii)(B) not to prohibit *any* nonpicketing publicity would make the proviso unnecessary and deprive the three statutory qualifying conditions of all practical effect.

The legislative history of the prohibition and the proviso makes clear that Congress understood that the statutory phrase "threaten, coerce, or restrain" would encompass some nonpicketing publicity (such as handbilling, newspaper advertisements, and radio appeals); a proviso permitting some but not all such publicity was the compromise that produced the consensus necessary for the enactment of the legislation. The court of appeals' construction of the statute unravels this legislative compromise. The principle of *Catholic Bishop* should not be used to defeat what Congress intended.

II. The Court's decision in *Safeco* makes clear that the compromise that Congress struck in Section 8(b)(4)(ii)(B) is constitutional as applied to respondent union's handbilling in this case. In *Safeco*, six Justices agreed that application of Section 8(b)(4)(ii)(B) to a union's peaceful picketing urging a total consumer boycott of a neutral employer did not violate the First Amendment. The "speech" interest, the governmental interest, and the fit between regulatory means and regulatory end are essentially the same in this case as in *Safeco*. Accordingly, the constitutionality of Section 8(b)(4)(ii)(B) as applied to respondent union's handbilling should follow directly from the *Safeco* decision.

Safeco is not distinguishable on the ground that picketing, rather than handbilling, was involved in that case. Picketing involves both speech and conduct, but as Justice Blackmun noted in his *Safeco* concurrence, Section 8(b)(4)(ii)(B) regulates only the speech aspect of picketing: it bans picketing only when, and because, the picketing conveys a particular message to consumers. Similarly, Section 8(b)(4)(ii)(B) bans handbilling only when, and because, it conveys a particular message to consumers. The subject of regulation in both cases is the message that the union seeks to convey, not the medium used to convey it.

The decision in *Safeco* and the constitutional question in this case are therefore properly understood not in terms of the Court's "picketing" cases but rather in terms of the

Court's "content-based" speech regulation cases. Those cases acknowledge that certain categories of speech are of less central concern to the First Amendment and, accordingly, are subject to less rigorous First Amendment protection. Labor speech urging consumers to boycott a neutral employer in order to facilitate the favorable resolution of a primary labor dispute reflects the "commonsense differences" that distinguish these less central categories of speech from speech subject to full First Amendment protection. Labor speech of this type seeks economic gain and requests economic action; it is unlikely to be unduly deterred by government regulation; and it takes place in an area that has traditionally been subject to government regulation. Thus, regulation of this labor speech should be analyzed in terms of the less exacting standards applied to less central categories of speech.

As applied to the message conveyed by the picketing at issue in *Safeco* and by the handbilling at issue here, Section 8(b)(4)(ii)(B) passes constitutional muster under these less exacting standards. The government's interest in discouraging the involvement of neutral employers in labor disputes, in order to prevent the spread of labor discord, is well established and substantial. The statutory ban on the union's consumer appeals "directly advances" this governmental interest: it bans only coercive appeals—i.e., those that are likely to cause a neutral employer to become enmeshed in a labor dispute between a union and a primary employer. And the restriction imposed by Section 8(b)(4)(ii)(B) is no more extensive than is necessary to serve the government's interest: it does not prohibit any consumer appeal directed against the primary employer; it does not prohibit any noncoercive appeal to the customers of secondary employers; and it allows coercive appeals to the customers of secondary employers where the conditions of the publicity proviso are satisfied. Section 8(b)(4)(ii)(B) prohibits only those secondary appeals that, in Congress's judgment, are likely to result in an unacceptable spread of labor discord to

true neutrals. Congress has therefore struck a reasonable "balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife" (*Safeco*, 447 U.S. at 617-618 (opinion of Blackmun, J.)).

ARGUMENT

I. A UNION "THREATENS, COERCES, OR RESTRAINS" A NEUTRAL EMPLOYER WITHIN THE MEANING OF SECTION 8(b)(4)(ii)(B) WHEN IT DISTRIBUTES HANDBILLS URGING A TOTAL CONSUMER BOYCOTT OF A NEUTRAL EMPLOYER'S BUSINESS

Section 8(b)(4)(ii)(B) makes it an unfair labor practice for a union to "threaten, coerce, or restrain" any person with an "object" of "forcing or requiring" that person to "cease doing business with any other person," unless the union is engaging in "publicity, other than picketing, for the purpose of truthfully advising the public, including consumers * * *, that a product or products are produced by an employer with whom the [union] has a primary dispute and are distributed by another employer" and "such publicity does not have an effect of inducing any individual employed by any person other than the primary employer" to refuse to make deliveries or perform services "at the establishment of the employer engaged in such distribution" (29 U.S.C. 158(b)(4)(ii)(B)). The handbilling in this case clearly had the proscribed secondary "object": as the NLRB found (Pet. App. 42a), it was intended "to force the mall tenants to cease doing business with [petitioner] in order to force [petitioner] and/or Wilson's [to cease] do[ing] business with High." And this Court held in *DeBartolo I* (463 U.S. at 155-157) that the union's handbilling was not protected by the publicity proviso because there is no "distributor" relationship between High and Wilson's co-tenants. The remaining statutory question is whether the handbilling "threaten[ed], coerce[d], or restrain[ed]"

the mall's tenants within the meaning of Section 8(b)(4)(ii)(B). The answer is that, by urging a total consumer boycott of the mall's tenants, respondent union's handbilling had this statutorily proscribed effect.

A. The Statutory Phrase "Threaten, Coerce, Or Restrain" Encompasses Handbilling Urging A Total Consumer Boycott Of A Secondary Employer

The phrase "threaten, coerce, or restrain," as used in labor-management relations law, has long been understood to encompass the kind of indirect pressure involved in this case: a message from an employer or (here) a union to third parties (here, consumers) asking them to take specified action (here, a boycott), in order to exert economic pressure on a target (here, the neutral retailers), to compel the target to act in a desired manner. For example, very similar phrases in Sections 8(a)(1)⁹ and 8(b)(1)¹⁰ of the statute have long been construed to encompass "blacklisting" of employees—that is, the sending of a message to third-party employers asking them to refrain from employing the listed employees in order to exert pressure on those employees. See, e.g., *Cousins Associates, Inc.*, 125 N.L.R.B. 73, 83 (1959), enforced, 283 F.2d 242 (2d Cir. 1960) (employer threat to blacklist union supporters); *Globe Products Corp.*, 102 N.L.R.B. 278, 284 (1953) (same); *F.W. Woolworth Co.*, 101 N.L.R.B. 1457, 1458 (1952) (same); *Pacific American Shipowners Ass'n*, 98 N.L.R.B. 582, 586, 639-640 (1952) (union threat

⁹ Section 8(a)(1) provides (29 U.S.C. 158(a)(1)) that "[i]t shall be an unfair labor practice for an employer * * * to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7] of [the statute]."

¹⁰ Section 8(b)(1) provides (29 U.S.C. 158(b)(1)) that "[i]t shall be an unfair labor practice for a labor organization or its agents * * * to restrain or coerce (A) employees in the exercise of rights guaranteed in [Section 7] of [the statute] * * *; or (B) an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances."

to blacklist non-union supporters); *National Union of Marine Cooks and Stewards, C.I.O.*, 92 N.L.R.B. 877, 891 (1950) (same). The phrase has also been applied to a union's distribution of "[w]e do not patronize" lists to consumers in order to compel an employer to recognize a union and sign a union shop agreement. See, e.g., *International Ass'n of Machinists, Lodge 942 (Alloy Mfg. Co.)*, 119 N.L.R.B. 307, 309 (1957), enforcement denied in pertinent part, 263 F.2d 796, 799-800 (9th Cir. 1959); *NLRB v. United Rubber Workers (O'Sullivan Rubber Corp.)*, 269 F.2d 694, 697-701 (4th Cir. 1959), rev'd on other grounds, 363 U.S. 329 (1960).

This Court has similarly interpreted the statutory phrase "threaten, coerce, or restrain" in Section 8(b)(4)(ii)(B) to encompass speech or conduct by a union that asks third parties to act in a way that exerts economic pressure on a neutral employer to compel him to bow to the union's will. For example, in *NLRB v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58 (1964) (*Tree Fruits*), the Court held that the phrase "threaten, coerce, or restrain" bars a union from engaging in peaceful picketing that asks consumers to cease all trading with the neutral, but not peaceful picketing that merely asks consumers to refrain from purchasing the primary employer's product from the neutral employer. The *Tree Fruits* Court reasoned (377 U.S. at 72 (footnote omitted)):

When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employer's purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict

injury on his business generally. In such cases, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer [and thus "threaten[s], coerce[s], or restrain[s]" the secondary employer within the meaning of the statute].

Similarly, in *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607 (1980) (*Safeco*), the Court held that the phrase "threaten, coerce, or restrain" bars a union from engaging in peaceful picketing that urges a total consumer boycott of a product that constitutes all of a neutral employer's business. The Court in *Safeco* explained that Congress intended in Section 8(b)(4)(ii)(B) to prohibit unions from embroiling or threatening to embroil neutral employers in their primary labor disputes (447 U.S. at 611-613), that neutral employers will become so embroiled whenever a "successful" appeal is "reasonably likely" to threaten them with "ruin or substantial loss" (*id.* at 613-614, 614-615, 615-616 n.11), and that such ruin or substantial loss will result whenever "[s]econdary picketing against consumption of the primary product leaves responsive consumers no realistic option other than to boycott the [neutral employer] altogether" (*id.* at 613; see also 614-615).¹¹

Nonpicketing publicity, such as handbilling, may, when it urges a total consumer boycott, be just as coercive of the neutral employer. See Cox, *Strikes, Picketing And The Constitution*, 4 Vand. L. Rev. 574, 599-602 (1951);

¹¹ Three Justices dissented in *Safeco* on the theory (447 U.S. at 620 (emphasis in original)) that consumer picketing at a secondary site is not "coercive" when it "is directed [only] at the primary employer's product" and does not "more broadly exhort[] customers to withhold patronage from the full range of goods carried by the secondary retailer, including those goods originating from non-primary sources." Respondent union urged consumers to withhold all patronage from the secondary employers. Thus, the issue that divided the Court in *Safeco* is not presented here. Accord, *Boxhorn's Big Muskego Gun Club, Inc. v. Electrical Workers Local 494*, 798 F.2d 1016, 1019 (7th Cir. 1986).

Gregory, *Constitutional Limitations On The Regulation Of Union And Employer Conduct*, 49 Mich. L. Rev. 191, 198-210 (1950); cf. *Tree Fruits*, 377 U.S. at 68 (emphasis added) (the "prohibition of [Section] 8(b)(4) is keyed to the coercive nature of conduct, *whether it be picketing or otherwise*"). In assessing coercion, this Court has focused on the nature of the actions required or requested of "responsive consumers"; the Court held in *Tree Fruits* and *Safeco* that peaceful picketing urging a total consumer boycott of a secondary employer is "coercive" within the meaning of Section 8(b)(4)(ii)(B) because "responsive consumers" have no choice but to take actions that are "reasonably likely to threaten the neutral party with ruin or substantial loss" (*Safeco*, 447 U.S. at 613, 615-616 n.11; see also *Tree Fruits*, 377 U.S. at 72). The NLRB has, for the same reason, consistently found that handbilling or other similar publicity calling for a total consumer boycott of a secondary employer's business "threaten[s], coerce[s], or restrain[s]" the secondary employer within the meaning of the statute.

For example, shortly after the enactment of Section 8(b)(4)(ii)(B), the NLRB found that a union's distribution of "Do Not Patronize" lists to union members and the public in support of its primary dispute with a radio station "threatened, restrained, and coerced the listed neutral[] [merchants]" (*Local 662, Radio and Television Engineers (Middle South Broadcasting)*, 133 N.L.R.B. 1698, 1705 (1961)).¹² The NLRB explained that "[t]he 'DO NOT PATRONIZE' leaflets threatened economic retaliation against the listed firms by seeking to induce individuals not to trade with the listed firms and thereby cause them loss of business. No more potent form of restraint and coercion can be visualized than economic retaliation in the form of loss of business" (*id.* at 1714). And, the NLRB added, prior to the enactment of Section

¹² The NLRB, however, found that the union's distribution of the "Do Not Patronize" lists came within the protection of the publicity proviso. See 133 N.L.R.B. at 1705-1706.

8(b)(4)(ii)(B), it had interpreted the phrase "restrain or coerce" in Section 8(b)(1)(A) of the statute to encompass such indirect economic pressure tactics in the *Alloy Mfg. Co.* case and, while that case had been "called to the attention of the Senate during the debates on the Section 8(b)(4) amendments, there is nothing in the legislative history to indicate any intention on the part of the sponsors of this amendment to exclude this type of union conduct from the reach of the amendment" (133 N.L.R.B. at 1715).¹³

The NLRB again found that nonpicketing publicity urging a total consumer boycott is "coercive" within the meaning of Section 8(b)(4)(ii)(B) a few years later in

¹³ In *International Ass'n of Machinists, Lodge 942 (Alloy Mfg. Co.)*, 119 N.L.R.B. 307, 309 (1957), the NLRB found that a minority union had violated Section 8(b)(1)(A) by, among other things, distributing "[w]e do not patronize" lists in support of its demand that an employer recognize the union and sign a union shop agreement with it. While the Ninth Circuit denied enforcement of that part of the NLRB's order in *Alloy Mfg. Co.* on the ground that the union's nonpicketing publicity fell "within the general area of protection of the 1st amendment guaranteeing freedom of speech" (*NLRB v. International Ass'n of Machinists, Lodge 942*, 263 F.2d 796, 799-800 (9th Cir. 1959)), the Fourth Circuit upheld the NLRB's position in another similar case (see *NLRB v. United Rubber Workers (O'Sullivan Rubber Corp.)*, 269 F.2d 694 (1959), *rev'd on other grounds*, 363 U.S. 329 (1960)).

At the time Congress debated whether to enact the "threaten, coerce, or restrain" standard in Section 8(b)(4)(ii)(B), it was aware of the conflict between these two decisions. See 105 Cong. Rec. 14348, 15520, 15855-15856 (1959); II NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 1523, 1556, 1688 (1959) [hereinafter *Leg. Hist.*]. But Congress did not resolve the conflict; it addressed only the "recognitional" picketing question that had been decided in those two cases. See H.R. Rep. 1147, 86th Cong., 1st Sess. 40-41 (1959); I *Leg. Hist.* 944-945. See also *NLRB v. Drivers Local 693 (Curtis Bros.)*, 362 U.S. 274, 290 (1960) (holding that Section 8(b)(1)(A) is a limited grant of authority "to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof" and cannot be interpreted to regulate peaceful "recognitional" picketing that does not have the unlawful objective specified in Section 8(b)(4) of the statute).

American Federation of Television and Radio Artists (Great Western Broadcasting Corp.), 150 N.L.R.B. 467 (1964), *aff'd sub nom. Great Western Broadcasting Corp. v. NLRB*, 356 F.2d 434 (9th Cir.), cert. denied, 384 U.S. 1002 (1966). In *Great Western Broadcasting Corp.*, the union asked various advertisers to cease doing business with a television station with which the union was involved in a primary strike. In furtherance of its request, however, the union distributed and threatened to distribute handbills urging a total consumer boycott of advertisers that refused to cooperate with it. The NLRB found that the union's "activities were directed toward the institution of a consumer boycott of all products distributed by the companies it listed as advertising on [the television station], * * * [that by] failing to limit its activities to the products in dispute, * * * [the union] [had] exceeded the limited privilege to engage in product boycotts which the *Tree Fruits* decision recognized, * * * [and] that such conduct clearly constitutes threats, restraint, or coercion within the meaning of Section 8(b) (4) (ii) of the Act" (150 N.L.R.B. at 471).¹⁴

The subsequent cases in which the NLRB has confronted this issue consistently rely on and reflect the same reasoning: that nonpicketing publicity urging a total consumer boycott of a secondary employer "threaten[s], coerce[s], or restrain[s]" within the meaning of Section 8(b) (4) (ii) (B) because it threatens that employer not with a loss of sales only of the primary employer's product but with a loss of all patronage of those customers who choose to respond to the appeal. See, e.g., *Honolulu Typographical Union No. 37 (Hawaii Press Newspaper, Inc.)*, 167 N.L.R.B. 1030, 1032 (1967), enforced, 401 F.2d 952 (D.C. Cir. 1968) (distribution of handbills at entrance to shopping center complex asking for consumer

¹⁴ The NLRB found, however, that the union's nonpicketing publicity met the publicity proviso's distribution requirement and, accordingly, did not violate Section 8(b) (4) (ii) (B) (150 N.L.R.B. at 472).

boycott of retail establishments located therein "coerced" those establishments within the meaning of Section 8(b) (4) (ii) (B)); *Hospital and Service Employees Union, Local 339 (Delta Air Lines, Inc.)*, 263 N.L.R.B. 996, 997 (1982), remanded, 743 F.2d 1417 (9th Cir. 1984) (handbills distributed outside of airport terminal facility and city ticket offices asking the public not to "Fly Delta" were "coercive" within the meaning of Section 8(b) (4) (ii) (B)); *Local No. P-9, United Food and Commercial Workers Union (Geo. A. Hormel Co.)*, 281 N.L.R.B. No. 135, at 5 (Feb. 26, 1986) (handbills asking depositors to close their accounts in banks with which the primary employer had banking transactions were "coercive" within the meaning of the statute). This consistent application of the statutory phrase by the expert agency charged with responsibility for administering the statute is entitled to deference. Accord, *Safeco*, 447 U.S. at 615-616 n.11; see generally *Pattern Makers' League v. NLRB*, 473 U.S. 95, 114-115 (1985); *id.* at 116-117 (White, J., concurring); *Ford Motor Co. v. NLRB*, 441 U.S. 448, 497 (1979).

B. Notwithstanding *Catholic Bishop*, The Text And Legislative History Of Section 8(b)(4)(ii)(B) Do Not Permit The Construction The Court Of Appeals Reached

The court below did not dispute the reasoning that led the NLRB to find that nonpicketing publicity seeking a total consumer boycott of a secondary employer is coercive. Instead, citing (Pet. App. 4a-6a, 14a, 37a) *NLRB v. Catholic Bishop*, 440 U.S. 490, 500 (1979) ("an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available"), it construed Section 8(b) (4) (ii) (B) as not prohibiting the use of peaceful, nonpicketing publicity (such as handbilling) under *any* circumstances. As the Court noted in *DeBartolo I*, however, the principle of statutory construction applied in *Catholic Bishop* "serves only to authorize the construction of a statute in a manner that

is 'fairly possible' " (*DeBartolo I*, 463 U.S. at 157, quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)), and does not license an interpretation that would deprive "the statutory language * * * of substantial practical effect" (*DeBartolo I*, 463 U.S. at 157 n.10), or an interpretation that would otherwise nullify "the affirmative intention of the Congress clearly expressed" (*NLRB v. Catholic Bishop*, 440 U.S. at 501). Construing Section 8(b)(4)(ii)(B) not to prohibit secondary handbilling under any circumstances is not "fairly possible."

1. The phrase "threaten, coerce, or restrain" in Section 8(b)(4)(ii)(B) cannot be read in isolation. It is expressly modified by the publicity proviso that Congress adopted at the same time. That proviso relates only to nonpicketing publicity, and it exempts such publicity only if it meets three qualifying conditions: it must be truthful; it must advise the public of a producer-distributor relationship between the primary and secondary employers; and it must not result in an interference with deliveries or in a work stoppage at the neutral employer's premises. The proviso itself would serve no purpose and these elaborate conditions would have no meaning if nonpicketing publicity could not violate Section 8(b)(4)(ii)(B) in any circumstances. See *Tree Fruits*, 377 U.S. at 69 (emphasis added) ("the Senate conferees refused to accede to the House proposal without safeguards for the right of unions to appeal to the public, even by *some* conduct which might be 'coercive,' " and "[t]he result was the addition of the proviso").

Thus, in *DeBartolo I*, the Court ruled that Section 8(b)(4)(ii)(B) must be interpreted in a way that gives meaning to the qualifying conditions on the proviso. The Court stated that "[t]he only [nonpicketing] publicity exempted from the prohibition is [truthful] publicity intended to inform the public that the primary employer's product is 'distributed by' the secondary employer" (463 U.S. at 155). The Court was "persuaded that Congress included that requirement to reflect the concern that motivates all

of [Section] 8(b)(4): 'shielding unoffending employers and others from pressures in controversies not [of] their own' " (*id.* at 155-156, quoting *NLRB v. Denver Building Construction Trades Council*, 341 U.S. 675, 692 (1951)). And the Court emphasized that, "if Congress had intended all peaceful, truthful handbilling that informs the public of a primary dispute to fall within the proviso, the statute would not have contained a distribution requirement" (463 U.S. at 156). Accordingly, the Court concluded that the handbilling in this case is not protected by the publicity proviso, for to conclude otherwise would, in the Court's view, deprive the distribution requirement of "substantial practical effect" (*id.* at 157 n.10). The necessary corollary of this conclusion, of course, is that some nonpicketing publicity, like some picketing publicity, is coercive and, if not exempt under the proviso, unlawful. See *Tree Fruits*, 377 U.S. at 69; *NLRB v. Servette*, 377 U.S. 46, 54-56 (1964).

The court below attempted to respond to the "substantial practical effect" argument by suggesting (Pet. App. 32a-33a n.19) that "[t]he proviso was not designed to restrict communicative activity" and that "the portions of the amendments to [Section] 8(b)(4) which restrict communicative activity continue to have substantial practical effect—they regulate picketing, strikes, threats to employers, etc." This suggestion is sophistic. It is true, of course, that the proviso is not itself designed to "restrict communicative activity." But Section 8(b)(4)(ii)(B) is designed to restrict communicative activity, and the proviso is designed to exempt elaborately specified kinds of nonpicketing publicity, and those elaborate specifications have no meaning unless Section 8(b)(4)(ii)(B) applies to at least some truthful nonpicketing publicity. Accord *DeBartolo I*, 463 U.S. at 156, 157 & n.10. The contrary suggestion of the court below reduces the qualifying conditions in the nonpicketing publicity proviso to mere legislative "blather" (*Boxhorn's Big Muskego Gun Club, Inc. v. Electrical Workers, Local 494*, 798 F.2d 1016,

1024 (7th Cir. 1986) (criticizing Eleventh Circuit's treatment of the "publicity proviso").

2. The legislative history of Section 8(b)(4)(ii)(B) indicates that the qualifying conditions in the publicity proviso were no accident. To the contrary, it is clear that Congress understood that the statutory phrase "threaten, coerce, or restrain" would exempt only some nonpicketing publicity.

This Court has reviewed the legislative history of the Act's secondary boycott provisions in detail on prior occasions. See *Tree Fruits*, 377 U.S. at 64-70; *NLRB v. Servette*, 377 U.S. 46, 51-56 (1964). As explained in those cases, Congress first made secondary boycotts an unfair labor practice in 1947 in Section 8(b)(4) of the Taft-Hartley Act, ch. 120, 61 Stat. 141. Section 8(b)(4) prohibits a union from calling for a strike, or concerted refusal to handle goods, where the object is to compel an employer to cease doing business with another person. But, as originally enacted, Section 8(b)(4) had many significant loopholes.¹⁵ Accordingly, in 1959, the Administration introduced legislation in the Senate aimed at comprehensively addressing the secondary boycott problem by making it an unfair labor practice for a union to "threaten, coerce, or restrain" a secondary employer with the object of forcing that employer to cease doing business with a primary employer. See S. 748, 86th Cong., 1st Sess. 59 (1959); I NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 84, 142 (1959) [hereinafter *Leg. Hist.*]. Testifying in sup-

¹⁵ In *Tree Fruits*, the Court noted (377 U.S. at 64-65) that "[t]hree major loopholes were revealed. Since only inducement of 'employees' was proscribed, direct inducement of a supervisor or the secondary employer by threats of labor trouble was not prohibited. Since only a 'strike or a concerted refusal' was prohibited, pressure upon a single employee was not forbidden. Finally, railroads, airlines and municipalities were not 'employers' under the Act and therefore inducement or encouragement of their employees was not unlawful."

port of this proposal, Secretary of Labor Mitchell stated that, "[u]ndoubtedly, prior interpretations of the words 'coerce' and 'restrain' will be extended to those provisions of the proposed bill which use identical language" (*Labor-Management Reform Legislation: Hearings on S. 505 et al. Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 86th Cong., 1st Sess. 407, 410 (1959) [*Senate Hearings*]). He offered cases decided under Sections 8(a)(1) and 8(b)(1) of the statute to illustrate his point (*Senate Hearings* 409-411). See also 105 Cong. Rec. 1567-1568 (1959); II *Leg. Hist.* 993-994. While this testimony no doubt heartened Senators who favored restricting all forms of pressure on secondary employers by unions,¹⁶ it also provoked Senators

¹⁶ During the Senate hearings, various members of the Senate expressed their support for prohibiting all forms of coercion of secondary employers by unions. Senator McClellan, for example, proposed to amend an alternative proposal, the Kennedy-Ervin bill (which did not include a "coercion" prohibition), to make it unlawful to "exert, or attempt to exert, any economic or other coercion against, or offer any inducement to, any [secondary] person engaged in commerce * * *" (105 Cong. Rec. 5970; II *Leg. Hist.* 1193); Senator McClellan made clear that his proposal would cover appeals to consumers of the secondary employer (105 Cong. Rec. 5971; II *Leg. Hist.* 1194). Senator Curtis similarly favored legislation that would broadly bar unions from pressuring secondary employers in furtherance of their primary labor disputes. He testified (*Labor-Management Reform Legislation: Hearings on S. 505 et al. Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 86th Cong., 1st Sess. 753 (1959) [*Senate Hearings*]):

Another type of economic pressure not covered by the present language of Taft-Hartley's section 8(b)(4) is the secondary consumer or customer boycott.

A union can apparently picket the customer entrances of a retail store which is carrying a product manufactured by a company with which a union has a primary dispute. Similarly, a union can organize a consumer or customer boycott against a soft drink distributing company merely because that company advertises on a radio or television station or in a newspaper with which the union has a primary dispute. These are ex-

who, citing the *Alloy Mfg. Co.* case, objected to the bill for precisely the same reason: the words "coerce" and "restrain" had been interpreted in other provisions of the statute to encompass nonpicketing appeals to consumers. See, e.g., 105 Cong. Rec. 6231-6232; II *Leg. Hist.* 1037 (remarks of Senator Humphrey).¹⁷ Ultimately, the Senate adopted an alternative proposal, the Kennedy-Ervin bill, which did not include the Administration's proposed revisions to Section 8(b)(4). See S. 1555, 86th Cong., 1st Sess. (1959); I *Leg. Hist.* 516-585.

In the House, by contrast, the Landrum-Griffin bill from the outset embodied the Administration's proposed revisions to Section 8(b)(4), including the prohibition against "coercion" of neutral employers. See *Tree Fruits*, 377 U.S. at 67; I *Leg. Hist.* 680-681. While Congressman Griffin introduced the bill bearing his name by giving direct coercion of a secondary employer as an example of the kind of conduct that the amended Section 8(b)(4)(ii)(B) would prohibit (see 105 Cong. Rec. 15532; II *Leg. Hist.* 1568), he subsequently indicated that the provision would also bar a union from putting indirect economic pressure on a secondary employer to cease doing business with a primary employer—by, for example, en-

amples of secondary customer or consumer boycotts. They are a potent form of economic pressure and are intended to be made unlawful by the language of my bill.

A current case involves station WKRK and WKRK-TV in Mobile, Ala. A union which lost an election immediately began picketing the stations, and also is attempting to bring economic pressure on sponsors who continue to advertise on the stations. They threatened the sponsors with loss of business.

The "current case involv[ing] Station WKRK and WKRK-TV in Mobile, Ala." to which Senator Curtis referred was *Radio Broadcast Technicians, Local Union No. 1264 (WKRK-TV, Inc.)*, 123 N.L.R.B. 507 (1959), where a union had organized a consumer boycott by means of nonpicketing publicity (*id.* at 509-510).

¹⁷ Senator Humphrey also suggested that the Administration's approach would raise serious constitutional questions. See 105 Cong. Rec. 6231-6232; II *Leg. Hist.* 1037.

gaging in picketing that urged a total consumer boycott of the neutral's business (105 Cong. Rec. 15672-15673; II *Leg. Hist.* 1615). The House adopted the Landrum-Griffin bill on this understanding. See 105 Cong. Rec. 14540-14541; II *Leg. Hist.* 1701-1702.

On August 18, 1959, a conference committee, chaired by Senator Kennedy, took up consideration of the two chambers' respective bills. See 105 Cong. Rec. 15942, 15965, 17325; II *Leg. Hist.* 1335, 1351, 1375. Two days later, while the conference was in progress, Senator Kennedy and Congressman Thompson, a house conferee, issued a joint analysis of the Senate and House bills. See *Tree Fruits*, 377 U.S. at 69; 105 Cong. Rec. 16588, 16591. With respect to the secondary boycott provisions of the Landrum-Griffin bill, Senator Kennedy and Congressman Thompson stated:

7. CONSUMER BOYCOTTS

The House bill provides that a union may not "restrain" or "coerce" an employer where an object is to require him to cease doing business with any other employer. The prohibition reaches not only picketing but leaflets, radio broadcasts and newspaper advertisements, thereby interfering with freedom of speech.

Suppose that the employees of the Coors Brewery were to strike for higher wages and the company attempted to run the brewery with strikebreakers. Under the present law, the union can ask the public not to buy Coors beer during the strike. It can picket the bars and restaurants which sell Coors beer with the signs asking the public not to buy the product. It can broadcast the request over the radio or in newspaper advertisements.

The House bill outlaws such appeals to the general public for assistance in winning fair labor standards. * * * This is a basic infringement upon freedom of expression. The portions of the House bill which have this effect are unacceptable.

But other members of the conference committee, while sharing this understanding of the meaning and effect of

the Landrum-Griffin bill, expressed their approval of these secondary boycott provisions and apparently were unwilling totally to abandon them. See 105 Cong. Rec. 17325-17327; II *Leg. Hist.* 1375-1377.

Accordingly, on August 28, 1959, Senator Kennedy suggested that, to break the deadlock, the Senate should "accept the broad language of the House bill with respect to secondary boycotts" and instead "insist on a few wholly reasonable and necessary limitations" (105 Cong. Rec. 17327; II *Leg. Hist.* 1377). Specifically, he proposed a resolution under which the Senate would accept the House version of Section 8(b)(4)(ii)(B), completely "recede[] on the question of consumer picketing of a secondary employer" (105 Cong. Rec. 17328; II *Leg. Hist.* 1378), and insist on the addition of the following language with respect to nonpicketing publicity (105 Cong. Rec. 17333; II *Leg. Hist.* 1383):

Provided, That nothing contained in this subsection (b) shall be construed * * * to prohibit publicity for the purpose of truthfully advising the public (including consumers) that an establishment is operated, or goods are produced or distributed, by an employer engaged in a labor dispute, without inducing employees to refuse to pick up, deliver or transport any goods, or perform any services at such establishment.

The explanation accompanying this resolution stated that "secondary boycotts would be forbidden with only the[] reservation[] * * * [that] [w]orkers would not be denied the traditional right to ask the public not to patronize one who sells nonunion goods or goods of a manufacturer engaged in a labor dispute" (105 Cong. Rec. 17334; II *Leg. Hist.* 1384). See also 105 Cong. Rec. 17327, 17333; II *Leg. Hist.* 1377, 1383.

The conference committee then resumed its deliberations and, on September 3, 1959, adopted with only slight modification the compromise that Senator Kennedy had suggested. In explaining the conference committee's agreement, Senator Kennedy stated (105 Cong. Rec. 17878-17899; II *Leg. Hist.* 1432) that the Senate conferees had insisted upon protecting:

(c) The right to appeal to consumers by methods other than picketing asking them to refrain from buying goods made by nonunion labor and to refrain from trading with a retailer who sells such goods.

Under the Landrum-Griffin bill it would have been impossible for a union to inform the customers of a secondary employer that that employer or store was selling goods which were made under racket conditions or sweatshop conditions, or in a plant where an economic strike was in progress. We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but we were able to persuade them to agree that the union shall be free to conduct information activitie[s] short of picketing. In other words, the union can hand out handbills at the shop, can place advertisements in [the] newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory picketing in front of a secondary site.

See also 105 Cong. Rec. 16254-16255; II *Leg. Hist.* 1388-1389 (remarks of Senator Kennedy). Congressman Thompson reported the "Major Changes" made by the conference committee to the Landrum-Griffin bill in similar terms, saying (105 Cong. Rec. 18133; II *Leg. Hist.* 1720) that:

2. Consumer Appeals: The right to publicize non-union goods to consumers, without causing a secondary work stoppage, is recognized in the conference agreement. Employees will also be entitled to publicize, without picketing, the fact that a wholesaler or retailer sells goods of a company involved in a labor dispute. All appeals for a consumer boycott would have been barred by [the] House bill.

In sum, the legislative history of the statute shows that two key members of the conference committee, including the committee's chairman, understood—and explained to their colleagues in their respective chambers—that the phrase "threaten, coerce, or restrain" would

cover consumer appeals carried out not only through picketing but also through such other means as hand-billing, newspaper advertisements, and radio broadcasts. These committee members understood—and again explained to their colleagues in their respective chambers—that certain nonpicketing consumer appeals would be exempted from the statutory proscription, but only when those appeals satisfied the specific conditions of the publicity proviso—including the condition that there be a producer/distributor relationship between the primary and secondary employers; every example given by Senator Kennedy or Congressman Thompson in explaining the conference agreement involved nonpicketing publicity directed against a secondary employer distributing the products of the employer with whom the union had a primary dispute. There simply is no evidence that any member of the conference committee or, for that matter, any member of the Congress had any different understanding,¹⁸ and the statements of Senator Kennedy and Representative Thompson, as members of the conference committee and as sponsors of the compromise reached therein,¹⁹ are entitled to authoritative weight. See *Woelke*

¹⁸ To the contrary, Senator Goldwater, for example, described the conference agreement as providing for “permitted-but-limited” nonpicketing publicity (105 Cong. Rec. 19771; II *Leg. Hist.* 1857). See also 105 Cong. Rec. 16419; II *Leg. Hist.* 1437 (remarks of Senator Goldwater); 105 Cong. Rec. 16423; II *Leg. Hist.* 1441 (remarks of Senator Curtis).

¹⁹ The court below plainly erred in suggesting (Pet. App. 35a n.20) that Senator Kennedy’s views are not an authoritative guide to the construction of the statute because he was initially an opponent of the Landrum-Griffin bill. Whatever views Senator Kennedy may initially have held with respect to that bill, he was acting as chairman of the conference committee when he made the statements quoted in text and, even more important, he was the sponsor of the compromise that the conference committee adopted to settle the differences between the competing House and Senate bills. As the proponent of that compromise, Senator Kennedy’s statements are clearly entitled to authoritative weight. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. at 656 n.9.

& *Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 656 n.9 (1982); *National Woodwork Mfrs. Ass’n v. NLRB*, 386 U.S. 612, 640 (1967).

To be sure, as the court below noted (Pet. App. 26a-32a), the conference committee’s “summary analysis” described (1) the House bill as “[p]rohibit[ing] secondary customer picketing at retail stores which [happens to] sell a product produced by manufacturer with whom the union has a primary dispute[,]” and (2) the conference committee’s agreement as “[a]dopt[ing] House provision with clarification that other forms of publicity are not prohibited * * * [and with] clarification that picketing at primary site is not secondary boycott” (105 Cong. Rec. 18021-18022; II *Leg. Hist.* 1712). But this “summary analysis” is just what its title suggests it is: a table summarizing the principal provisions of the conference agreement. Accordingly, when the summary analysis was introduced into the legislative record, Congressman Griffin emphasized that it was “a preliminary report on the agreement worked out in conference * * * [and] [was] not designed to explain the bill in every detail but * * * [rather to] serve as a helpful summary to indicate the nature of the settlement reached by the conference on the important points of difference between the House and the Senate bill” (105 Cong. Rec. 18021; II *Leg. Hist.* 1712).²⁰ It is therefore not surprising that the “summary analysis” discussed only the paradigms upon which the conference committee principally focused—i.e., consumer picketing and nonpicketing consumer publicity directed at a secondary employer in a producer/distributor relationship with the primary employer—and did not expressly deal with the less common forms of secondary boycott—e.g., nonpicketing publicity urging a total consumer boycott of a secondary employer that is

²⁰ While Senator Goldwater introduced the “summary analysis” into the record without these qualifications (see 105 Cong. Rec. 18705-18706; II *Leg. Hist.* 1454), he did so on September 9, 1959, six days after the Senate had voted to accept the conference agreement (see 105 Cong. Rec. 17919-17920; II *Leg. Hist.* 1453).

not in a producer/distributor relationship with the primary employer. But these less common forms of secondary boycott were also subject to the conference committee's compromise and nothing in the "summary analysis" indicates that these less common forms of secondary boycott were not intended to be covered.²¹

The summary analysis offers highlights rather than exegesis, and it simply is not a precise description of what activities are prohibited. For example, the summary analysis states without qualification that the statutory prohibition extends to "secondary customer picketing at retail store which happens to sell product produced by manufacturer with whom union has dispute" (105 Cong. Rec. 18021-18022; II *Leg. Hist.* 1712). But that is clearly a substantial overstatement: *Tree Fruits* held that the statutory prohibition extends only to secondary customer picketing that is aimed at entirely "shutting off the patronage of a secondary employer" (377 U.S. at 67).

3. Accordingly, the principle of statutory construction set forth in *Catholic Bishop* cannot be applied in the way the court of appeals sought to apply it. The language of

²¹ That the "summary analysis" uses the term "clarification" in describing the conference committee compromise with respect to both the publicity and primary activity provisos certainly does not contradict this understanding. The language of the two provisos makes them readily distinguishable. The primary activity proviso does not contain the words of limitation that the publicity proviso contains; thus, the former but not the latter may properly be treated as an explanation of the scope of, rather than as an exception to, the secondary boycott provisions. Furthermore, the final report of the conference committee, which repeats the publicity proviso in *haec verba*, does not in any way suggest that the publicity proviso is a mere restatement of any prior bill or law; in contrast, that report expressly states that the purpose of the primary activity proviso was "to make it clear that the changes in section 8(b)(4) do not overrule or qualify the present rules of law permitting picketing at the site of a primary labor dispute" (H.R. Rep. 1147, 86th Cong., 1st Sess. 38 (1959); I *Leg. Hist.* 942). Thus, contrary to the conclusion of the court below (Pet. App. 30a-31a), the use of the term "clarification" in the "summary analysis" cannot be taken as evidence that the publicity proviso was inserted merely to make clear that no prohibition was intended.

Section 8(b)(4)(ii)(B), including the publicity proviso, as well as the legislative history of the section, demonstrate that Congress intended to bar some nonpicketing secondary activity and to provide only a limited exemption. *Catholic Bishop* does not authorize the courts to undo what Congress—after lengthy negotiation and compromise—plainly intended. See *DeBartolo I*, 463 U.S. at 157 n.10; *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933); *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518 (1926); *Crowell v. Benson*, 285 U.S. at 76-77 (Brandeis, J., dissenting).

II. SECTION 8(b)(4)(ii)(B), AS APPLIED TO RESPONDENTS' HANDBILLING IN THIS CASE, DOES NOT VIOLATE THE FIRST AMENDMENT

The remaining question is whether the compromise that Congress struck in Section 8(b)(4)(ii)(B) contravenes the First Amendment when applied to respondent's handbilling in this case. The Court's decision in *Safeco* makes it clear that this question should be answered in the negative.

1. In *Safeco*, six Justices agreed that application of Section 8(b)(4)(ii)(B) to a union's peaceful picketing urging a total consumer boycott of a neutral employer did not violate the First Amendment. See 447 U.S. at 616 (plurality opinion); *id.* at 617-618 (opinion of Blackmun, J.); *id.* at 618-619 (opinion of Stevens, J.).²² The plurality reasoned that Congress has prohibited unions from "spread[ing] labor discord by coercing a neutral party to join the fray" (*id.* at 616), that "a prohibition on 'picketing in furtherance of * * * unlawful objectives' [does] not offend the First Amendment" (*id.* at 616, quoting *Electrical Workers v. NLRB*, 341 U.S. 694, 705 (1951)), and therefore that, "[a]s applied to picketing that predictably encourages consumers to boycott a secondary

²² Because they interpreted the statutory ban differently than did the six Justices in the majority, the dissenting Justices in *Safeco* had no occasion to discuss the First Amendment question.

business, [Section] 8(b)(4)(ii)(B) imposes no impermissible restrictions upon constitutionally protected speech" (447 U.S. at 616). Justice Blackmun said that "[t]he plurality's cursory discussion" of the First Amendment question was incomplete because it did not address the content-based nature of the regulation in issue, but agreed that the Court should not "hold unconstitutional Congress's striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife" (447 U.S. at 616, 617-618). And Justice Stevens, agreeing with Justice Blackmun that "[t]he constitutional issue . . . [was] not quite as easy as the plurality would make it seem" since a content-based regulation was in issue, concluded that Section 8(b)(4)(ii)(B)'s limited ban on the union's picketing was "sufficiently justified by the purpose to avoid embroiling neutrals in a third party's labor disputes" (447 U.S. at 618, 619).

The First Amendment question that arises from the application of Section 8(b)(4)(ii)(B) to respondent union's handbilling is not materially different from the First Amendment question decided in *Safeco*. The union's First Amendment interest in being free to urge a total public boycott of a secondary employer, in order to facilitate a favorable resolution of a primary labor dispute, is essentially the same in both cases. The governmental interest in preventing the spread of labor discord to neutral, secondary employers is essentially the same if not stronger in this case—because the neutral employer here is not even in the chain of distribution. And in each instance the statute bans no more communicative activity than is necessary to further the governmental interest at issue. Accordingly, the constitutionality of Section 8(b)(4)(ii)(B) as applied to the union's handbilling in this case should follow directly from the *Safeco* decision.

2. *Safeco* involved picketing, rather than handbilling, but that does not make this case distinguishable for First

Amendment purposes. As Justice Black noted in his *Tree Fruits* concurrence (377 U.S. at 77-79), picketing includes both (1) conduct (that is, standing or marching back and forth or round and round on the streets or sidewalks adjacent to someone's property) and (2) speech (that is, arguments or appeals, usually set forth on a placard, made to persuade other people to take the picketers' side of a dispute). See also *Safeco*, 447 U.S. at 618-619 (opinion of Stevens, J.); *Bakery & Pastry Drivers v. Wohl*, 315 U.S. 769, 775-777 (1942) (Douglas, J., concurring). The conduct aspect of picketing may be regulated subject to different First Amendment considerations than the speech aspect. See *Hotel & Restaurant Employees' International Alliance, Local 122 v. Wisconsin Employment Relations Board*, 315 U.S. 437, 442 (1942); *Milk Wagon Drivers' Union, Local 753 v. Meadowmoor Dairies*, 312 U.S. 287, 298 (1941). But as Justice Black also noted in his *Tree Fruits* concurrence (377 U.S. at 77-79), and as Justices Blackmun and Stevens reiterated in their *Safeco* concurrences (447 U.S. at 617, 618), Section 8(b)(4)(ii)(B) does not regulate the conduct aspect of picketing.²³ It does not ban or physically restrict picketing for reasons of public order; rather, it bans picketing only when it involves the expression of a particular appeal to consumers (i.e., to cease all trade with a neutral employer because of a union's labor dispute with a primary employer).²⁴ Similarly, Section

²³ Though Justice Stevens' opinion in *Safeco* also discussed the conduct aspect of picketing, it started with the premise that "this is another situation in which regulation of the means of expression is predicated squarely on its content" (447 U.S. at 618).

²⁴ In Justice Black's words (377 U.S. at 79 (emphasis in original)): "we have neither a case in which picketing is banned because the picketers are asking others to do something unlawful nor a case in which all picketing is, for reasons of public order, banned. Instead, we have a case in which picketing, otherwise lawful, is banned only when the picketers express particular views. The result is an abridgement of the freedom of these picketers to tell a part of the public their side of a labor controversy, a subject the free discussion of which is protected by the First Amendment."

8(b)(4)(ii)(B) bans handbilling only when it involves the expression of a particular appeal to consumers. Therefore, the decision in *Safeco* cannot properly be explained, or distinguished from the present case, on the ground that picketing was in issue there and handbilling is in issue here; in both cases, the subject of the regulation is the message that the union seeks to convey, not the medium used to convey the message.²⁵

3. The content-based speech regulation in *Safeco* was properly upheld, and no different result is appropriate here. To be sure, content-based restrictions on speech generally will not be sustained unless they are "narrowly drawn" to achieve a "compelling" state interest. See, e.g., *Carey v. Brown*, 447 U.S. 455, 461-463, 464-469 (1980); *First National Bank v. Bellotti*, 435 U.S. 765, 784-787, 787-795 (1978). But certain categories of speech occupy a less central position in relation to First Amendment values than speech on issues of public concern and the Court has said that content-based regulations of these kinds of speech will be sustained if they directly advance

²⁵ While we believe that the constitutionality of Section 8(b)(4)(ii)(B) as applied to respondent union's handbilling should turn on the government's legitimate interest in narrowly regulating the specific message being expressed (and not on the question whether a constitutional distinction exists between regulation of picketing and regulation of handbilling), we note that on-the-spot handbilling, like picketing, has a conduct element that is subject to regulation in its own right; on-the-spot handbilling, like picketing, involves the possibly intimidating presence of the distributor. See *Bozkorn's Big Muskego Gun Club, Inc. v. Electrical Workers, Local 494*, 798 F.2d at 1020; cf. *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 315-316 (1968), overruled on other grounds *sub nom. Hudgens v. NLRB*, 424 U.S. 507 (1976) ("Handbilling, like picketing, involves conduct other than speech, namely, the physical presence of the person distributing leaflets * * *"); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 457 ("in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection"). But see *Babbitt v. Farm Workers*, 442 U.S. 289, 311 n.17 (1979) (citation omitted) ("picketing is qualitatively 'different from other modes of communication'").

a "substantial" governmental interest and are no more restrictive than is necessary to serve that interest. See *Posadas de Puerto Rico Associates v. Tourism Co.*, No. 84-1903 (July 1, 1986) (commercial speech) (*Posadas*); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (credit reporting); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (indecent language); see generally *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63-71 (1976) (opinion of Stevens, J.). The content-based restrictions at issue in *Safeco* and the instant case are sustainable because the "labor speech" involved in the two cases occupies such a less central position in the hierarchy to First Amendment values.

a. In concluding that some speech is of less central concern to the First Amendment, the Court has repeatedly pointed to certain "commonsense differences" between those varieties of speech and expression that addresses issues of public concern. See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562 (1980); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-456 (1978). The Court has said, for example, that speech connected with profit-making transactions is generally more hardy than classic political speech and is therefore less likely to be unduly deterred by government regulation. See *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. at 762 (opinion of Powell, J.); *Friedman v. Rogers*, 440 U.S. 1, 9-10 & n.9 (1979); *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 771-772 n.24 (1976). The Court has also said that the truthfulness of some varieties of speech is easier to verify and that inaccuracies in such speech need not be tolerated as much as in speech relating to matters of public concern. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. at 564 n.6; *Bates v. State Bar*, 433 U.S. 350, 381, 383 (1977). And the Court has said that some speech occurs in "area[s] traditionally subject to government regulation" and that "[t]o require a parity of constitutional protection" between such speech and expression that addresses issues

of public concern "could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech" (*Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 456). Accord, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. at 562-563 n.5.

As the Court has recognized, these "commonsense differences" also distinguish much speech on particular labor disputes from speech on matters of public concern. The Court has said, for example, that "[t]he interests of the contestants in a labor dispute are primarily economic" (*Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. at 762), and that the speech of employers and unions with respect to organizational and collective bargaining issues is therefore unlikely to be unduly deterred by government regulation. See *id.* at 763 n.17; *id.* at 778 & n.3 (Stewart, J., concurring); *Bates v. State Bar*, 433 U.S. at 383. Similarly, the Court has said that the contestants in a labor dispute are uniquely situated to understand the characteristics and costs of their organizational and collective bargaining activities and thus may be held accountable for the accuracy of their statements concerning these issues. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618, 620 (1969) (employer predictions of economic loss resulting from union organization must "be carefully phrased on the basis of objective fact"); *NLRB v. Operating Engineers*, 400 U.S. 297, 304-305 (1971) (union responsible for "foreseeable consequences" of its conduct). And, most importantly, the Court has said that "[a]ny assessment" of labor speech "must be made in the context of its labor relations setting" (*NLRB v. Gissel Packing Co.*, 395 U.S. at 617), and that "what is basically at stake is the establishment of a nonpermanent, limited relationship between the employer, his economically dependent employee[s], and [their] union agent[s], not the election of legislators or the enactment of legislation whereby that relationship is ultimately defined and where the independent voter may be freer to listen more

objectively and employers [and unions] as a class freer to talk" (*id.* at 617-618). Thus, in *Virginia Pharmacy Bd.*, the Court said that it could "see no satisfactory distinction between" commercial speech and labor speech (425 U.S. at 763) and Justice Stewart, pursuing the commercial speech-labor speech analogy, noted that Congress may impose "restrictions designed to promote antiseptic conditions in the labor relations context * * * [that] would be constitutionally intolerable if applied in the political arena" (*id.* at 778 n.3 (Stewart, J., concurring)).²⁶

Speech by a union urging consumers to boycott a neutral employer in order to help bring about the favorable resolution of a primary labor dispute over wages or other terms and conditions of employment also manifests "commonsense differences" from speech on issues of public concern. As Professor Cox has noted, "[r]equests for immediate assistance in putting economic pressure upon one with whom the speaker is engaged in driving a private business bargain are readily distinguishable from words looking forward to political action. In the former instance the gain sought and the action requested are both economic" (Cox, *The Supreme Court 1979 Term—Forward: Freedom of Expression in the Burger Court*, 94 Harv. L. Rev. 1, 39 (1980)). Moreover, the union is uniquely situated in these cases to evaluate the accuracy and effect of its message. Accord *Longshoremen Ass'n v.*

²⁶ Justice Stewart noted (425 U.S. at 778 n.3 (citations omitted)) that "[s]peech by an employer or a labor union organizer that contains material misrepresentations of fact or appeals to racial prejudice may form the basis of an unfair labor practice or warrant the invalidation of a certification election. * * * Such restrictions would clearly violate First Amendment guarantees if applied to political expression concerning the election of candidates to public office. * * * Other restrictions designed to promote antiseptic conditions in the labor relations context, such as the prohibition of certain campaigning during the 24-hour period preceding the election, would be constitutionally intolerable if applied in the political arena."

Allied International, Inc., 456 U.S. 212, 224-225, 226-227; *Safeco*, 447 U.S. at 614-615 & n.9. And, finally, whether it be conveyed by means of pickets, handbills, or other media, speech by a labor organization promoting a consumer boycott of a neutral employer to facilitate resolution of a primary labor dispute takes place in an area traditionally subject to government regulation. See *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. at 777-778 (Stewart, J., concurring). Compare *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982), and *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 417-419 (1971), with *Longshoremen Ass'n v. Allied International, Inc.*, 456 U.S. at 226-227. Accordingly, regulation of that speech—in *Safeco* and here—is best understood and analyzed in terms of the standards applied to regulation of less central categories of expression (such as commercial speech). Accord, *Cox*, *supra*, 94 Harv. L. Rev. at 39; cf. *Carey v. Brown*, 447 U.S. at 466-467 (suggesting that labor picketing is less “deserving of First Amendment protection than are public protests over other issues, particularly * * * economic, social, and political subjects”); *Roberts v. United States Jaycees*, 468 U.S. 609, 637-638 (1984) (O'Connor, J., concurring) (less First Amendment protection available to unions “for the commercial purposes of engaging in collective bargaining, administering labor contracts, and adjusting employment-related grievances,” than for “ideological or political associations”).²⁷

²⁷ That respondent union may have been “expressing social and moral values[] as well as economic considerations in its written message” (Pet. App. 14a n.7) does not entitle it to have its economic message treated as if it were central to First Amendment values. For one thing, Section 8(b)(4)(ii)(B) does not prevent a union from expressing any social, moral, or economic views it may have; Section 8(b)(4)(ii)(B) only prevents the union from requesting that consumers totally boycott a neutral employer in order to facilitate its resolution of a labor dispute with a primary employer. See *Safeco*, 447 U.S. at 617-618 (Blackmun, J.); *id.* at 618-619 (Stevens, J.); see also *Tree Fruits*, 377 U.S. at 93 (Harlan,

b. Speech of kinds less central to First Amendment concerns “receives a limited form of First Amendment protection so long as it concerns a lawful activity and is not misleading or fraudulent” (*Posadas*, slip op. 11). See also *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. at 563-564. “Once it is determined that the First Amendment applies to the particular kind of * * * speech at issue, then the speech may be restricted only if the government’s interest in doing so is substantial, the restrictions directly advance the government’s asserted interest, and the restrictions are no more extensive than necessary to serve that interest” (*Posadas*, slip op. 11). See also *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 507 (1981) (opinion of White, J.). Here, as in *Safeco*, it is undisputed that the union’s speech concerned a lawful activity—a boycott by consumers in order to encourage a neutral employer to put pressure on a primary employer—and that this speech was neither misleading nor fraudulent. But it is equally clear that the regulation of the union’s speech, both here and in *Safeco*, satisfied the other standards applied to categories of expression that are of less central concern to the First Amendment.²⁸

J., dissenting) (ban on secondary picketing constitutional because Congress has acted with “discriminating eye”). Second, it is not necessary that the sole object of a secondary boycott by a labor union be economic gain; an otherwise subordinate category of speech does not receive a higher level of First Amendment protection just because it is motivated by or appended to an issue of public interest (and therefore may incidentally stimulate thought or debate about that public issue). Accord, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 n.7 (1985); *Bolger v. Youngs Drug Product Corp.*, 463 U.S. 60, 67-68 (1983); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. at 563 n.5; *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. at 780 n.8 (Stewart, J., concurring). The same principle applies, of course, to regulable conduct intended as symbolic speech. See *United States v. O'Brien*, 391 U.S. 367 (1968).

²⁸ As the elements of this test make clear, an appropriate regulation of respondent union’s handbilling may be sustained even

The government's interest in restricting a union's call for a total consumer boycott of a neutral secondary employer is well established. Section 8(b)(4) aims to "shield[] unoffending employers and others from pressures in controversies not their own" (*NLRB v. Denver Building Construction Trades Council*, 341 U.S. 675, 692 (1951)), and thereby to prevent the spread of "labor discord" (*Safeco*, 447 U.S. at 616). Accord *Longshoremen Ass'n v. Allied International, Inc.*, 456 U.S. at 223 & n.20, 225; *Carpenters v. NLRB*, 357 U.S. 93, 100 (1958). All six Justices who reached the First Amendment question in *Safeco* agreed that this governmental interest is substantial. See 447 U.S. at 616 (plurality opinion); *id.* at 616 (opinion of Blackmun, J.); *id.* at 618 (opinion of Stevens, J.).

The statutory ban on union appeals for a total consumer boycott of neutral employers "directly advances" this governmental interest. The prohibition shields unoffending employers from labor controversies that are not of their own making. Moreover, it does so only in circumstances where the appeals are or threaten to be coercive; that is, in circumstances where the appeal threatens to expose the secondary employer to substantial loss or ruin. Congress reasonably determined that restrictions on such appeals will make neutral employers less likely to become enmeshed in the labor disputes of primary employers and unions. See generally *Posadas*, slip op. 12 ("direct advancement" step met where legislative judgment is a "reasonable one"); *Metromedia, Inc. v. San Diego*, 453 U.S. at 508-509 (opinion of White, J.) ("direct advancement" step met where legislative judgment is "not manifestly unreasonable").

though "the Union was not seeking to have the consumers, the mall tenants, or [petitioner] and/or Wilson's do anything which would be illegal" (Pet. App. 13a). Had respondent union been seeking to have any of these persons commit an illegal act, its handbilling would not be entitled to any First Amendment protection at all. See *Posadas*, slip op. 11; *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 495-504 (1949).

Finally, the restriction on the union's speech is no more extensive than is necessary to serve the government's interest. Section 8(b)(4)(ii)(B) does not prohibit consumer appeals, by picketing or otherwise, directed solely against the primary employer; thus, in this case, respondent union could, for example, have engaged in picketing or handbilling at appropriate locations that told consumers about its dispute with High without asking for a boycott of the mall tenants. See *International Brotherhood of Electrical Workers, Local No. 278 (Kelinske Elec. Co.)*, 232 N.L.R.B. 1044 (1977); *Amalgamated Packinghouse Workers (Packerland Packing Co.)*, 218 N.L.R.B. 853, 854 (1975). Nor does Section 8(b)(4)(ii)(B) prohibit secondary consumer appeals, by picketing or otherwise, that are not coercive of the secondary employer; thus, an appeal that would not reasonably cause the secondary employer to fear loss of business would not be unlawful and, in fact, in this case, no challenge was brought to respondent union's appeal to consumers to "express to store managers your concern over substandard wages and your support of our efforts" (Pet. App. 41a). And, by virtue of the publicity proviso, Section 8(b)(4)(ii)(B) even allows a union to engage in coercive consumer appeals, provided that the union makes the appeal by a means other than picketing, ensures that the appeal is truthful, limits the appeal to advising consumers and the public that a secondary employer is in the chain of distribution, and does not affect deliveries or work at the neutral's business establishment; thus, in *Safeco*, the union's handbilling was not challenged (447 U.S. at 610 n.3) and, in this case, respondent union could have distributed handbills (at the East Lake Square Mall or the site of any other Wilson store) urging consumers to boycott Wilson (or any other business for whom High was performing construction work). See *Local Union No. 54, Sheet Metal Workers (Sakowitz, Inc.)*, 174 N.L.R.B. 362, 363-364 (1969). Section 8(b)(4)(ii)(B) prohibits only second-

ary consumer boycotts that, in Congress's judgment, are likely to result in an unacceptable spread of labor discord to true neutrals—i.e., picketing that is reasonably likely to threaten a secondary employer with ruin or substantial loss, and nonpicketing publicity that is reasonably likely to threaten a secondary employer who is not in the chain of distribution with such ruin or loss. Section 8(b)(4)(ii)(B) is a “narrowly drawn” regulation. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. at 565; cf. *City of Renton v. Playtime Theatres, Inc.*, No. 84-1360 (Feb. 25, 1986), slip op. 10 (“ordinance is ‘narrowly tailored’ to affect only that category of theatres shown to produce the unwanted secondary effects”).

That Section 8(b)(4)(ii)(B) satisfies each of the standards applicable to content-based regulation of less central categories of speech explains, we submit, the First Amendment result reached by the six Justices in the *Safeco* majority and, concomitantly, why the same result should be reached here. The speech and expressive conduct of private employers, their employees, and the employees’ unions with respect to organizational and collective bargaining issues simply does not lie at the heart of the First Amendment. Rather, it is a type of speech that, because of the labor context in which it arises, may be subjected to reasonable government regulation—even on the basis of content.²⁹ This explains why the six Justices

²⁹ For this reason, *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), do not directly bear on the First Amendment question presented in this case. Those cases involved neither speech arising in the labor-management context nor a regulation of speech that was “narrowly drawn.” In *Keefe*, a community organization was enjoined from leafletting or otherwise urging consumers to boycott a real estate broker who had engaged in various racially discriminatory tactics to increase his real estate business. 402 U.S. at 417, 419. In *Claiborne Hardware Co.*, black citizens were enjoined from organizing or otherwise promoting a consumer boycott of white merchants in order to force those merchants and elected offi-

in the *Safeco* majority were able to find that, notwithstanding the fact that the union had been denied the right to engage in secondary picketing on the basis of the message it was expressing, Congress had struck a reasonable “balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife” (447 U.S. at 617-618 (opinion of Blackmun, J.)). Accord *id.* at 616 (plurality opinion); *id.* at 619 (opinion of Stevens, J.).³⁰ And it also explains why Congress may constitutionally bar respondent union from engaging in handbilling that expresses the same view. The First Amendment interest in the two cases is essentially the same; the governmental interest in protecting neutrals is even stronger where, as here, the neutral is outside of the

cials to accede to their demands for racial equality and integration. 458 U.S. at 893, 909, 914. In both cases, the Court found that the government had failed to show that the injunctions issued with respect to the particular expressive activity in issue were necessary to further a legitimate governmental interest. *Keefe*, 402 U.S. at 419-420; *Claiborne Hardware Co.*, 458 U.S. at 912-915. In both cases, the Court made plain that a narrowly drawn regulation of a consumer boycott organized for economic as opposed to wholly political ends would be sustained. See *Keefe*, 402 U.S. at 419-420; *Claiborne Hardware Co.*, 458 U.S. at 912, 915, 915 n.49. Indeed, *Claiborne Hardware Co.* expressly stated that, “Secondary boycotts and picketing by labor unions may be prohibited, as part of ‘Congress’ striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free of coerced participation in industrial strife” (*id.* at 912, quoting *Safeco*, 447 U.S. at 617-618 (opinion of Blackmun, J.)).

³⁰ Such cases as *Hughes v. Superior Court*, 339 U.S. 460 (1950), and *Teamsters v. Voght*, 354 U.S. 284 (1957), may also be so understood. While those cases suggest that a message conveyed through picketing may be proscribed because picketing is speech plus conduct, it was the speech element, not the conduct element, of picketing that was at issue in those cases. Accordingly, those cases are better understood in light of the Court’s more recent content-based speech regulation cases. See Cox, *supra*, 94 Harv. L. Rev. at 36-39.

chain of distribution; and the balance of the First Amendment and governmental interests in the two cases cannot reasonably be found to differ.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

LOUIS R. COHEN
Deputy Solicitor General

GLEN D. NAGER
Assistant to the Solicitor General

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney
National Labor Relations Board

AUGUST 1987

APPENDIX

Section 8(b)(4)(ii)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(ii)(B), provides in pertinent part:

It shall be an unfair labor practice for a labor organization or its agents—

• • • • •

(4) • • • (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

• • • • •

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, • • •

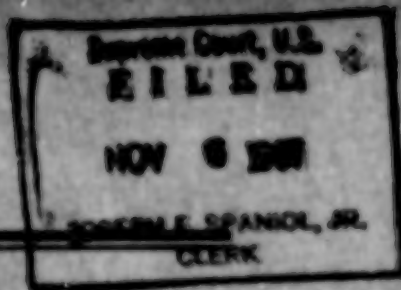
• • • • •

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution[.]

RESPONDENT'S

BRIEF

No. 86-1461



IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

THE EDWARD J. DEBARTOLO CORP.,
Petitioner,
v.

FLORIDA GULF COAST BUILDING AND
CONSTRUCTION TRADES COUNCIL

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

On a Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

BRIEF FOR THE UNION RESPONDENT

Of Counsel:

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

MARSHA BENZON
177 Post Street, Suite 300
San Francisco, CA 94108

MARK F. KELLY
401 South Albany
Tampa, Florida 33606

LAURENCE J. COHEN
1125 15th Street, N.W.
Washington, D.C. 20005

DAVID M. SILBERMAN
LAURENCE GOLD
(Counsel of Record)
815 16th St., N.W.
Washington, D.C. 20006
(202) 637-5390

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE STATUTORY ISSUE	4
A. Introduction	4
B. The Statutory Language	9
C. The Legislative History	13
II. THE CONSTITUTIONAL ISSUE	31
CONCLUSION	50

TABLE OF AUTHORITIES

CASES	Page
Babbitt v. Farm Workers, 442 U.S. 289 (1979) . . .	9, 40
Bakery Workers v. Wohl, 315 U.S. 769 (1942) . . .	39
Boxhorn's Big Muskego Gun Club v. Electrical Workers Local 394, 798 F.2d 1016 (7th Cir. 1986) . . .	28
Bose Corp. v. Consumers Union of United States, 466 U.S. 485 (1984) . . .	42, 47
Brandenburg v. Ohio, 395 U.S. 494 (1969) . . .	37
Cantwell v. Connecticut, 310 U.S. 296 (1950) . . .	32
Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557 (1980) . . .	46
Consolidated Edison Co. v. Public Service Com- mission, 447 U.S. 530 (1980) . . .	37, 38, 45
Cornelius v. NAACP Def. & Educ. Fund, — U.S. —, 105 S.Ct. 3439 (1986) . . .	38
Crowell v. Benson, 285 U.S. 22 (1932) . . .	4
Cousins Associates, Inc., 125 NLRB 73 (1959) . .	11
Drivers, Chauffeurs v. NLRB, 274 F.2d 551 (D.C. Cir. 1958), aff'd, 362 U.S. 274 (1960) . . .	11
Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) . . .	36, 41
Eastern R. Conf. v. Noerr Motors, 365 U.S. 127 (1961) . . .	4
Edward J. DeBartolo Corp. v. NLRB, 463 U.S. 147 (1983) . . .	4, 9
Electrical Workers v. Labor Board, 341 U.S. 694 (1951) . . .	10, 13
FCC v. Pacifica Foundation, 438 U.S. 726 (1976) .	42
First National Bank v. Bellotti, 435 U.S. 776 (1978) . . .	45, 46
Florida Power and Light v. Electrical Workers, 417 U.S. 790 (1974) . . .	13
Fox v. Washington, 236 U.S. 273 (1915) . . .	11
F.W. Woolworth Co., 101 NLRB 1457 (1952) . . .	11
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) .	36
Giboney v. Empire Storage Co., 336 U.S. 490 (1949) . . .	34, 39, 41, 49
Globe Products Corp., 102 NLRB 278 (1952) . . .	11
Hague v. CIO, 307 U.S. 496 (1939) . . .	7

TABLE OF AUTHORITIES—Continued

	Page
Hughes v. Superior Court, 339 U.S. 460 (1950) . .	2, 8, 33, 40
Hynes v. Mayor of Oradell, 425 U.S. 610 (1976) . .	32
Kleindienst v. Mandel, 408 U.S. 753 (1972) . . .	48
Labor Board v. Fruit Packers, 377 U.S. 58 (1964) .	9, 13, 14, 30
Labor Board v. Servette, 377 U.S. 46 (1964) . . .	9, 12, 14, 23, 25
Landmark Communications v. Virginia, 425 U.S. 844 (1978) . . .	44
Longshoremen v. Allied International, Inc., 456 U.S. 212 (1982) . . .	34, 40, 41
Lovell v. Griffin, 303 U.S. 444 (1938) . . .	6, 7
Lowe v. SEC, 472 U.S. 181 (1985) . . .	42, 44, 47
Mastro Plastics Corp. v. Labor Board, 350 U.S. 270 (1956) . . .	28
Milk Drivers & Dairy Employees Local 357 (<i>Loh- man Sales Co.</i>), 132 NLRB 901 (1961) . . .	12
Murdock v. Pennsylvania, 319 U.S. 105 (1943) . .	32
NAACP v. Button, 371 U.S. 415 (1963) . . .	50
NAACP v. Claiborne Hardware, 458 U.S. 886 (1982) . . .	35, 40, 41
Nebraska Press Association v. Stuart, 427 U.S. 539 (1976) . . .	35
New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938) . . .	33, 35
NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) . . .	2, 5, 24, 25
NLRB v. Drivers Local Union, 362 U.S. 274 (1958) . . .	13
NLRB v. Gissell Packing Co., 395 U.S. 575 (1969) .	49
NLRB v. Machinists Lodge 942 (<i>Alloy Mfg. Co.</i>), 263 F.2d 796 (9th Cir. 1959) . . .	11
NLRB v. Retail Store Employees, 447 U.S. 607 (1980) . . .	9, 13, 38, 39, 40
NLRB v. United Rubber Workers (<i>O'Sullivan Corp.</i>), 269 F.2d 694 (4th Cir. 1959), <i>rev'd on other grounds</i> , 363 U.S. 329 (1960) . . .	11

TABLE OF AUTHORITIES—Continued

	Page
Ohralik v. Ohio State Bar Assn., 436 U.S. 447 (1978)	42, 43
Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971)	3, 32, 36, 37, 49, 50
Pacific American Shipowners Ass'n, 93 NLRB 582 (1952)	11
Perry Education Association v. Perry Local Educators' Assn., 460 U.S. 37 (1983)	38
Posadas de Puerto Rico Associates v. Tourism Co., — U.S. —, 106 S.Ct. 2968 (1986)	44
Railroad Trainmen v. Terminal Co., 394 U.S. 369 (1969)	41
Schneider v. State, 306 U.S. 147 (1939)	7
Senn v. Tile Layers Union, 301 U.S. 468 (1937) ..	5
Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979)	36
Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960)	47
Steelworkers v. Weber, 443 U.S. 193 (1979)	28
Talley v. California, 362 U.S. 60 (1960)	7, 35
Teamsters Union v. Vogt, Inc., 354 U.S. 284 (1957)	8
Thomas v. Collins, 323 U.S. 516 (1945)	6, 35
Thornhill v. Alabama, 310 U.S. 88 (1940)	5, 46, 47, 48, 49
Traux v. Corrigan, 257 U.S. 312 (1921)	12
United States v. Hutcheson, 312 U.S. 219 (1941) ..	6, 33
Valentine v. Chrestensen, 316 U.S. 52 (1942)	7, 48
Va. Pharmacy Bd. v. Va. Consumer Council, 425 U.S. 748 (1976)	42, 43, 44, 46, 49
Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980)	32, 33
Yates v. United States, 354 U.S. 295 (1957)	9
Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976)	42

TABLE OF AUTHORITIES—Continued

STATUTES	Page
National Labor Relations Act, as amended, 29 U.S.C. § 141 <i>et seq.</i>	
§ 8(a) (1), 29 U.S.C. § 158(a) (1)	11
§ 8(a) (3), 29 U.S.C. § 158(a) (3)	29
§ 8(b) (1), 29 U.S.C. § 158(b) (1)	11, 13
§ 8(b) (4), 29 U.S.C. § 158(b) (4)	<i>passim</i>
§ 10(c), 29 U.S.C. § 160(c)	32
§ 10(1), 29 U.S.C. § 160(b)	32
LEGISLATIVE HISTORY	
Hearings Before a Joint Subcomm. of the House Comm. on Education and Labor, 86th Cong., 1st Sess. (1959)	19
Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 86th Cong., 1st Sess. (1959)	14, 15
Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (NLRB ed. 1959)	<i>passim</i>
S. 76, 86th Cong., 1st Sess. (1959)	19
MISCELLANEOUS	
Goldman, <i>The First Amendment and Nonpicketing Labor Publicity Under Section 8(b)(4)(ii)(B) of the National Labor Relations Act</i> 36 Vanderbilt Law Rev. 1469 (1983)	48

BRIEF FOR THE UNION RESPONDENT

The opinion below, the basis for invoking this Court's jurisdiction, and the statutory provisions involved are correctly set forth in the brief of petitioner Edward J. DeBartolo Corp. and the brief of the National Labor Relations Board as respondent supporting petitioner and we therefore do not repeat them here.

STATEMENT OF THE CASE

This case, which has been litigated on a stipulation of facts, concerns whether Congress has barred—in First Amendment terms has subjected to a prior restraint—and, if so, whether Congress may constitutionally bar the publication by the respondent Union of information concerning construction being done at a shopping mall owned by petitioners and of an accompanying request to members of the general public not to patronize the stores at the mall “until the Mall owner’s publicly promise that all construction . . . will be done using contractors who pay their employees fair wages.” See Appendix A to this brief setting out the Union’s communication at issue here in full.

It is undisputed that the message the Union seeks to communicate is entirely truthful and urges members of the public to act in a wholly lawful way. And it is likewise undisputed that the only means by which the Union seek to communicate this information and request is by printing and peaceably distributing the handbill reprinted in App. A hereto in a manner “not accompanied by any picketing or patrolling,” NLRB Br. at 3, n.2.

Notwithstanding these facts, the National Labor Relations Board held that the Union violated § 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended, by disseminating this message in this (or in other) way. The Board therefore issued an order directing the Union to cease and desist from publishing this message and the Board, having been unsuccessful below, now seeks enforcement of that order by this Court.

SUMMARY OF ARGUMENT

I. The threshold question here is one of statutory interpretation: is NLRA § 8(b)(4)(ii)(B) properly read as a *per se* prohibition on all means of publishing certain (secondary) messages or as a limited prohibition on circulating those messages through means, such as picketing, deemed to exert a coercive influence independent of the communication's content. The former interpretation would raise grave constitutional problems and, under this Court's precedents, is therefore only to be embraced if compelled by "the affirmative intention of Congress clearly expressed." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979). As of the time § 8(b)(4)(ii) was enacted it was well-established moreover that "picketing is not . . . the equivalent of speech" and is therefore not entitled to full constitutional protection, *e.g.*, *Hughes v. Superior Court*, 339 U.S. 460, 465 (1950), while other means of expression regarding labor disputes, including handbilling, are entitled to full constitutional protection. Especially clear evidence is thus required before concluding that Congress subjected the latter to a blanket prior restraint.

The statutory language contains no such evidence. Whereas section (i) of § 8(b)(4) makes it unlawful for a union to "induce or encourage" an *employee* to engage in unlawful secondary activity, subsection (ii) proscribes only "threaten[ing], coerc[ing] or restrain[ing]" persons other than employees. Subsection (ii) is thus more naturally read to prohibit those means of communication which go beyond such persuasion and interfere with the listener's ability to make a free choice as to how he will act. And the only evils that the sponsors of that subsection sought to reach were direct threats to secondary employers of labor trouble and *picketing* at the premises of such employers. The fact that at the last minute a "publicity proviso" was added to § 8(b)(4) to give express sanctuary to "do not buy" appeals concerning secondary employers who stand in a producer-

distributor relationship does not counsel a broad reading of that section's prohibition. The legislative history shows that the proviso was understood as a "clarification" intended to reassure opponents of the bill about a paradigm case and that the common understanding was that all means of circulating "do not buy" publicity other than picketing would remain lawful.

II. If the statute were construed to provide for a restraint on non-picketing communications by unions truthfully informing members of the general public about a labor dispute and urging the public to take lawful action in that dispute, the statute would violate nearly every First Amendment precept. That Amendment does not permit prior restraints, does not permit the state to punish the publication of truthful information urging lawful action, and does not permit censorship of speech on the basis of content, viewpoint, or the identity of the speaker absent an extraordinary justification not present here.

The attempt by the Board and the Employer to carve out for less favored First Amendment treatment a category of "labor speech" is without merit. The cases relied on in that effort are either picketing cases or commercial speech cases, and are inapposite. Because of its non-speech elements, picketing has long been subject to content based regulation of a type not permitted regarding handbilling or other forms of "pure speech." Labor speech is unlike commercial speech because the subject of labor speech implicates fundamental questions concerning the relationship between labor and capital in this society. Labor speech moreover is not an appeal to the listener's economic self-interest; it is an appeal to set aside such self-interest; it is, in other words, an appeal to the listener's moral and social conscience. This Court has therefore squarely held that "do not buy" appeals of the kind here qualify for full constitutional protection. *Organization for a Better Austin v. Keefe*, 402 U.S. 420 (1971).

ARGUMENT

I. THE STATUTORY ISSUE

The threshold question here is one of statutory interpretation: is NLRA § 8(b)(4)(ii)(B), which in terms makes it an unfair labor practice for a union to "threaten, coerce, or restrain" any person where the union is motivated by a secondary object, properly read as a *per se* prohibition on publishing certain (secondary) messages or is that section more properly read as prohibiting those messages from being circulated only through means, such as picketing, which are deemed to exert a coercive influence having nothing to do with the message. The decision of the Labor Board in this case rests on the former view, and as we now show that construction of the statute is unsound.

A. Introduction

"[W]hen Congress legislates in a fashion that restricts communicative activity, it expects the statutory language to be construed narrowly." *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147, 157 n.10 (1983). That "presumption," *id.*, reflects the respect due to Congress as a co-equal branch of government equally committed to protecting freedom of expression; for that reason "we cannot . . . lightly impute to Congress an intent to invade these freedoms," *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127, 138 (1961). And the presumption favoring a "narrow" construction of such legislation also enables the Court to avoid "unnecessary constitutional decisions." *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

For both of these reasons, before an Act of Congress is properly interpreted as trenching on freedom of speech the Court must be persuaded that no alternative construction is "fairly possible." *DeBartolo I*, 463 U.S. at 157. Put more concretely, where a particular construction of the Act "would give rise to serious constitutional questions," the Court "must first identify 'the affirmative intention of the Congress clearly expressed' " be-

fore embracing that construction. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) (emphasis added).

These salutary principles of statutory construction apply with especial force in the instant case because of the particular legal background against which Congress was legislating in 1959 when the Labor-Management Reporting and Disclosure Act ("LMRDA") was enacted and § 8(b)(4)(ii) was added to the NLRA. Three aspects of that background law are relevant here.

First, as of 1959 it was well-established that speech concerning a labor dispute falls within the core protection of the First Amendment and may not be proscribed on a content or viewpoint basis absent the most compelling of governmental interests. The Court first afforded constitutional protection to such speech in *Senn v. Tile Layers Union*, 301 U.S. 468, 478 (1937) (Brandeis, J.), and then elaborated on its conclusion in *Thornhill v. Alabama*, 310 U.S. 88 (1940):

In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . . The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. [*Id.* at 102-03]

The Court added: "[a]bridgement of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion." 310 U.S. at 104-05.

In *Thomas v. Collins*, 323 U.S. 516 (1945), the Court reaffirmed and elaborated on the lessons of *Thornhill* in the course of overturning the criminal conviction of a union leader for giving a speech soliciting union membership. The Court emphasized that the "right . . . to discuss and inform people concerning the advantages and disadvantages of unions and joining them is protected . . . as part of free speech." *Id.* at 532. And the Court concluded that the First Amendment protects "the opportunity to persuade to action, not merely to describe facts." *Id.* at 537.¹

Second, as of 1959, it was equally well-established that handbilling is a protected *means* of communication. This much was settled in *Lovell v. Griffin*, 303 U.S. 444 (1938), in which the Court invalidated an ordinance requiring anyone wishing to distribute a handbill to obtain a permit from the city. The Court reasoned:

The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. [*Id.* at 452]

That being so, a law requiring those desiring to circulate handbills to obtain prior permission from the state "strikes at the very foundation of the freedom of the

¹ See also Justice Jackson's concurring opinion in *Thomas*, 323 U.S. at 547 ("free speech on both sides and for every faction on any side of the labor relation is to me a constitutional and useful right. Labor is free to turn its publicity on any labor oppression, substandard wages, employer unfairness, or objectionable working conditions"); and Justice Stone's concurring opinion in *United States v. Hutcheson*, 312 U.S. 219, 243 (1941) ("the publication, unaccompanied by violence, of a notice that the employer is unfair to organized labor and requesting the public not to patronize him is an exercise of the right of free speech guaranteed by the First Amendment which cannot be made unlawful by act of Congress").

press by subjecting it to license and censorship," *id.* at 452.

The teaching of *Lovell* was followed on a number of occasions in the years prior to enactment of the LMRDA, including several cases which involved the distribution by unions of handbills addressed to some aspect of labor relations. For example, in *Hague v. CIO*, 307 U.S. 496 (1939), the Court overturned a restriction on the distribution of leaflets "discussing the rights of citizens under the National Labor Relations Act," *id.* at 501. And, in *Schneider v. State*, 308 U.S. 147 (1939), the Court invalidated a restriction on the distribution "in front of a meat market" to "pedestrians" of "handbills which pertained to a labor dispute with the market . . . and asked citizens to refrain from patronizing it," *id.* at 155.

Talley v. California, 362 U.S. 60 (1960), which was decided just a few months after the LMRDA was enacted (and which involved the distribution of handbills urging a consumer boycott of certain merchants who sold products made by manufacturers alleged to practice racial discrimination in employment), summed up the law at the time by reaffirming the holding of *Lovell* and of *Schneider* in the course of overturning a law prohibiting the distribution of anonymous leaflets. The *Talley* Court emphasized that "the ordinance here is not limited to handbills whose content is 'obscene or offensive to public morals' or that advocates unlawful conduct, 362 U.S. at 64."²

Third and finally, by the time the LMRDA was enacted, it was settled that *picketing* is "not . . . the equi-

² Of course, under *Valentine v. Chrestensen*, 316 U.S. 52 (1942), which was good law as of 1959, the protection afforded to handbilling did not extend to the distribution of "purely commercial advertising," *id.* at 54, as such "commercial speech" was deemed to be outside of the First Amendment. Significantly, however, at no time prior to 1959 was it ever suggested that speech about a labor dispute constituted commercial speech under *Valentine*. To the contrary, *Thomas v. Collins*, *supra*, was decided three years after *Valentine*.

valent of speech as a matter of fact" and hence is not speech's "inevitable legal equivalent." *Hughes v. Superior Court*, 339 U.S. 460, 465 (1950). The Court reasoned:

[W]hile picketing is a mode of communication it is inseparably something more and different. Industrial picketing "is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." . . . Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. [*Id.* at 464-65]

Because of these unique features of picketing, the Court concluded that unlike handbilling and other forms of speech, "[p]icketing is not beyond the control of a State if . . . the purposes which it seeks to effectuate give[] ground for its disallowance." 339 U.S. at 465-66. See also *Teamsters Union v. Vogt, Inc.*, 354 U.S. 284 (1957), where the Court after reviewing all its prior decisions in point, *id.* at 287-93, concluded that this "series of [picketing] cases . . . establish[] a broad field in which a state, in enforcing some public policy . . . could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy," *id.* at 293.

In announcing these rules and rendering these decisions, the Court expressly retreated from the language in *Thornhill* which had suggested that picketing occupies the same place within the First Amendment as handbilling and other forms of expression. *Vogt* states that *Hughes* and its progeny rest on an "implied reassessment[] of the broad language of the *Thornhill* case," 354 U.S. at 291, as the Court "came to realize that the broad pronouncements . . . of *Thornhill*" regarding picketing "had to yield 'to the impact of facts unforeseen or at least not sufficiently appreciated,'" 354 U.S. at 289.

Given this background, the cautionary note that Justice Harlan sounded in his opinion for the Court in *Yates v. United States*, 354 U.S. 295, 819 (1957), is especially apt in determining the scope of § 8(b)(4)(ii): "we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked."³ With that in mind, we turn to the statutory language and its legislative history.

B. The Statutory Language

Section 8(b)(4)(B) contains two discrete prohibitions stated in two separate subsections. Subsection (i) makes it an unfair labor practice for a union to "induce or encourage any individual employed by any person engaged in . . . an industry affecting commerce" to take certain specified actions in the course of his employment (such as "striking" or "refus[ing] . . . to . . . handle or work on" particular goods) where the union is animated by a secondary objective. Subsection (ii), in contrast, makes it an unfair labor practice for a union to

³ This background also makes relevant this Court's holding in *Babbitt v. Farm Workers*, 442 U.S. 289, 311-12 & n.17 (1979), that abstention was appropriate with respect to a challenge to a state law that was claimed to proscribe all secondary publicity; the Court reasoned that if the law were so construed "its constitutionality would be substantially in doubt," but that the statute could be construed to apply only to picketing or "threatening speech" in which case the constitutional question would be "wholly different."

Because the Labor Board viewed the constitutional questions raised by this case as outside its purview, the Board did not approach the statutory question in the manner stated in text. For that reason alone, the Board's construction of the statute is not entitled to special deference. In addition, in each prior decision involving the meaning of § 8(b)(4)(ii)(B) and/or its publicity proviso, including *DeBartolo I*, *supra*, *Labor Board v. Servette*, 377 U.S. 46 (1964) and *Labor Board v. Fruit Packers*, 377 U.S. 58 (1964), this Court has construed the statute for itself without giving deference to the Board; the Court has deferred only with respect to the application of the legal standard to particular facts, see *NLRB v. Retail Store Employees*, 447 U.S. 607, 615-16 & n.11 (1980).

"threaten, coerce or restrain any person engaged . . . in an industry affecting commerce" where the union is animated by such an objective.

The language of subsection (i) unmistakably covers *all* means of communicating appeals to *employees* to engage in certain secondary activity. As this Court has put it, "[t]he words 'induce or encourage' are broad enough to include in them every form of influence and persuasion," *Electrical Workers v. Labor Board*, 341 U.S. 694, 701-02 (1951); those words are not "limited to cases where the means of inducement or encouragement amount to a 'threat of reprisal or force or promise of benefit,'" *id.* at 702.

The language of subsection (ii), in contrast, is so limited and that language is not necessarily—or even easily—read to prohibit acts of reasoned communication. In a society that values both the right to persuade others to pursue particular courses of action (including action that may disadvantage a third person) and the right of each individual to decide for himself which of the lawful options open to him he will choose to exercise, a prohibition on "threaten[ing], coerc[ing], or restrain[ing]" need not be read to prohibit all reasoned attempts by a speaker to urge listeners, over whom the speaker has no control, voluntarily to act in a manner supportive of the speaker's position. Rather, the words of subsection (ii) are more naturally read to be addressed to the use of particular *means* of communication, those which go beyond the bounds of reasoned persuasion and interfere with the listener's ability to make a free choice as to how he will act.⁴

⁴ The Board suggests that the phrase "threaten, coerce, or restrain" is a term of art in "labor-management relations law" and as of 1959 had "long been understood to encompass the kind of indirect pressure" that results when A succeeds in persuading B to take some *lawful* action detrimental to the interests of C. NLRB Br. at 15. In support of this contention, the Board points to two

This Court first drew the distinction between peaceful means of communication which induce action and coercive means of communication which force action in *Traux*

lines of case, one involving "blacklisting" of employees" and one involving "a union's distribution of '[w]e do not patronize lists.'" NLRB Br. at 15-16. The Board's reliance on these cases is misplaced.

In three of the "blackballing" cases the Board cites, an employer told employees that if the employees exercised their statutory rights the employer would retaliate against them. See *Globe Products Corp.*, 102 NLRB 278, 283-86 (1952); *F.W. Woolworth Co.*, 101 NLRB 1457, 1468-70 (1952); *Cousins Associates, Inc.*, 125 NLRB 73, 80 (1959). Such retaliatory actions are proscribed by § 8(a)(1) of the Act, and the First Amendment has never been thought to shield threats of unlawful action, see e.g., *Fox v. Washington*, 236 U.S. 273 (1915). In the fourth case, *Pacific American Shipowners Ass'n*, 98 NLRB 582 (1952), a union was found to have violated § 8(b)(1)(A) by circulating to employers with whom the union had collective bargaining relationships a list of employees who had "deserted" the union and whom the union did not want hired by the employers. The Board reasoned that the union was committing an unlawful act: causing or attempting to cause the employer to discriminate against nonmembers. None of these cases suggests a special labor-relations meaning of the phrase "threaten, restrain or coerce."

Finally, the Board's reliance on the "we do not patronize" cases is even more misplaced because as of 1959 the leading authority on whether the phrase "restrain or coerce" in § 8(b)(1)(A) applied only to picketing or to handbill as well—and the only authority that was called to Congress' attention—was *NLRB v. Machinists Lodge 942 (Alloy Mfg. Co.)*, 263 F.2d 796, 799-800 (9th Cir. 1959), and the Ninth Circuit concluded there that, given the First Amendment implications, "a clearer mandate from Congress" was required before the phrase could be construed to reach "the conduct of the Union of listing and persuasion." The D.C. Circuit had gone even further and held that recognition picketing of an employer does not "restrain or coerce" the employer's employees. *Drivers, Chauffeurs v. NLRB*, 274 F.2d 551 (D.C. Cir. 1958), *aff'd* 362 U.S. 274. Cf. *NLRB v. United Rubber Workers (O'Sullivan Rubber Corp.)*, 269 F.2d 694 (4th Cir. 1959), *rev'd on other grounds*, 363 U.S. 329 (1960) (enforcing NLRB order against picketing and "conducting a boycott campaign" but without discussing the picketing-handbilling dichotomy).

v. Corrigan, 257 U.S. 312 (1921). There the Court held that a state law permitting primary picketing deprived the target employer of property without due process of law. In reaching its conclusion the Court emphasized that the conduct at issue "was not a mere appeal to the sympathetic aid of would-be customers by a simple statement of the fact of the strike and a request to withhold patronage," but rather was "moral coercion by illegal annoyance and obstruction . . ." *Id.* at 327-28.

More recently, both the Labor Board and this Court have drawn the same distinction in the course of applying the very subsection at issue here to communications addressed to *secondary employers*. From the very first the Board has held that "oral appeals made directly to a secondary employer to stop doing business with a primary employer are protected inducement or persuasion and not unlawful threats, restraints or coercion under subsection (ii)." *Milk Drivers and Dairy Employees Local 357 (Lohman Sales Co.)*, 132 NLRB 901, 904 n.5 (1961). And in *Labor Board v. Servette*, 377 U.S. 46 (1964), the Court affirmed this line of cases, stating:

The Conference Committee in adopting subsection (ii) understood that the subsection would reach only threats, restraints or coercion of the secondary employer and not a mere request to him for voluntary cooperation. Senator Dirksen, one of the conferees, stated that the new amendment "makes it an unfair labor practice for a union to try to coerce or threaten an employer directly (*but not to persuade or ask him*) in order— . . . To get him to stop doing business with another firm or handling its goods." [*Id.* at 54, n.12; citation omitted; emphasis added by the Court]

In sum, in crafting §§ 8(b)(4)(i) & (ii) Congress drew precisely the line that the case law as of 1959 had drawn between reasoned persuasion on the one hand, and coercive speech, including picketing, on the other. The statutory language reflects an intent to regulate the for-

mer only with respect to appeals addressed to employees urging unlawful secondary activity by the employees; Congress proceeded on the premise that "to induce or encourage a strike for an unlawful object" is not "any less objectionable than engaging directly in that strike," *Electrical Workers v. Labor Board*, 341 U.S. at 704. But the prohibitory language does not contain any "affirmative intention clearly expressed"—indeed, it negates any intention—to enter the "constitutional danger zone" of censoring reasoned communications addressed to the general public urging lawful action and distributed in a peaceful fashion. Thus, interpreting the words of the prohibition in § 8(b)(4)(ii) to reach only picketing and not to reach noncoercive forms of expression is not only "fairly possible" but is, indeed, the better reading of that language.⁵

C. The Legislative History

The Board's brief offers only bits and pieces from the legislative history, stitched together in a way that creates an incomplete and misleading picture of the process that led to the enactment of § 8(b)(4)(ii) and its publicity proviso. We therefore begin by setting forth the legislative materials in full.⁶

⁵ Ironically enough, the Board attempts to find an "affirmative indication" by Congress to regulate reasoned persuasion in the "publicity proviso" to § 8(b)(4) which was added to the LMRDA amendments at the conclusion of the legislative process and which delineates a type of conduct *not* prohibited by the statute. We trace the evolution of that proviso, and address its significance, *infra* at pp. 22-31.

⁶ This Court's decisions teach that the general language "threaten, coerce or restrain" must be construed in light of the legislative history which led to its enactment. See *Labor Board v. Fruit Packers*, *supra*, 377 U.S. at 62-71; *NLRB v. Retail Store Employees*, *supra*, 447 U.S. at 615 n.10. The Court has followed the same course in construing "restrain and coerce" in § 8(b)(1)(A), *NLRB v. Drivers Local Union*, 362 U.S. 274, 285-90 (1958), and in § 8(b)(1)(B), *Florida Power and Light v. Electrical Workers*, 417 U.S. 790, 803-05 (1974).

1. "The story of the 1959 amendments . . . [to § 8(b)(4)] begins with the original § 8(b)(4) of the National Labor Relations Act." *Labor Board v. Fruit Packers*, 377 U.S. 58, 64 (1964) ("Tree Fruits"). That section did nothing more than make it unlawful for a union to "induce or encourage the employees of any employer to engage in a strike or a concerted refusal in the course of their employment to . . . handle . . . any goods" of a primary employer. "This proved to be inept language" to accomplish Congress' aims, *id.* at 64, and the 1959 amendments were enacted "to close certain loopholes in the application of § 8(b)(4) which had been exposed in Board and court decisions," *Labor Board v. Servette*, 377 U.S. 46, 51 (1964).

The language now found in § 8(b)(4)(ii) making it an unfair labor practice to "threaten, coerce or restrain" a secondary originated in a bill drafted by the Eisenhower administration and introduced by Senators Goldwater and Dirksen. See S. 748, 86th Cong. 1st Sess. (1959), reprinted in, 1 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 142 (NLRB ed. 1959) ("Leg. Hist."). In testimony before the Senate Labor Committee, Secretary of Labor Mitchell identified the loophole to which this proposal was addressed:

Some unions have, . . . been able effectively to impose secondary boycotts and yet avoid the proscription of the act by directly threatening or coercing the employer (or his supervisory personnel) whom they want to cease doing business with another person. . . .

Under present law the Teamsters Union can . . . go directly to an employer and threaten him with "labor troubles" if he continues to do business with another employer. Often the threat of "labor trouble" is as potent a weapon as the "trouble" itself would be. Thus pressure can be applied to a secondary employer . . . without violating the law. [Hearings Before the Subcom. on Labor of the Sen-

ate Committee on Labor and Public Welfare, *Labor-Management Reform Legislation*, 86th Cong. 1st Sess. 265-66 (1959) ("1959 Senate Hearings")]

Secretary Mitchell was questioned at length by Senators Kennedy and Morse concerning the reach of the Administration's proposal and was asked to respond to various hypotheticals posed by Senators Kennedy and Morse; rather than providing an answer "off the cuff," 1959 Senate Hearings at 371, the Secretary submitted a "memorandum response," *id.* at 407.

The Secretary's memorandum while claiming that "[i]t is extremely difficult to state whether a violation of proposed legislation . . . would or would not be found upon the basis of a brief statement of a hypothetical situation," 1959 Senate Hearings at 410, stated certain general principles underlying the proposed subsection (ii). Of particular relevance here, the Secretary stressed: that "nothing in the proposed bill is designed to circumscribe a union's right of free speech as guaranteed by the constitution and as protected by section 8(c) of the Act;" that "more must be shown to establish a threat, coercion or restraint than to establish inducement or encouragement;" and that the determinative question in applying subsection (ii) would be whether the union's actions "constitute no more than requests or whether they amount to a threat, restraint or coercion calculated to attain ends considered improper," *id.* at 410-11.⁷

⁷ The Secretary invoked these general considerations in responding to the question whether it would be unlawful for a union to "put up a picket line in front of [a] store urging the public not to purchase ABC Products" in a situation in which the union "is engaged in a legitimate strike for higher wages at the ABC company"; the Secretary responded:

Whether this would be a violation of [the Administration's bill] would . . . depend on certain factual findings, taking into consideration all of the pertinent circumstances affecting the question whether the union was threatening, coercing or re-

The Democratic majority on the Senate Labor Committee was unpersuaded by the Administration's arguments, and the Committee reported out a bill which did not amend § 8(b)(4). See S. 155, 86th Cong. 1st Sess. (1959), 1 Leg. Hist. at 338. Senators Goldwater and Dirksen dissented, arguing that "decisions of the National Labor Relations Board and the courts have so interpreted section 8(b)(4) as to leave a number of gaping loopholes" which should be closed by adopting the Administration's proposal, S. Rep. No. 187, 86th Cong., 1st Sess. 78 (1959), 1 Leg. Hist. at 474; they identified the first "major loophole[]," S. Rep. 187 at 79, 1 Leg. Hist. at 475, as follows:

(1) Coercion of employers— . . . The [existing] prohibition is against the threatening or urging of the "employees" of the other employer. . . . Thus a union having a dispute with or attempting to organize the employees of employer A can go directly to employer B, who either uses employer A's products or supplies employer A with raw materials, and *threaten employer B with a strike or picket line if he continues to do business with employer A.* . . . Countless examples of actual cases corresponding to this hypothetical have been presented to Congressional committees in various hearings since 1947. [Emphasis added]

straining the secondary employer . . . [1959 Senate Hearings at 416]

The Board attempts to put an entirely different meaning on Secretary Mitchell's memorandum by citing to his further statement that "[u]ndoubtedly, prior interpretations of the words 'coerce' and 'restrain' will be extended to those provisions of the proposed bill which use identical language." NLRB Br. at 24-25, quoting 1959 Senate Hearings at 410. But although the Board pretends otherwise, Secretary Mitchell did not state (or cite any cases holding) that in these "prior interpretations" reasoned persuasion had been viewed as "restraint or coercion"; rather, the only cases Mitchell cited involved *direct* coercion in the form of strikes or refusals by unions to participate in arbitration proceedings.

On the floor of the Senate, Senator Humphrey took the lead against the Administration's proposal. He argued that although the proposed amendment proscribed only "threat[s]" and "not persuasion," the "fact is . . . that there is no meaningful line between the two, in this field at least" or more precisely "no meaningful line which . . . a legislative body can develop in theory." 2 Leg. Hist. at 1037. With particular reference to efforts to reason with customers of secondary employers Senator Humphrey stated:

At present a union may distribute leaflets at the premises of a neutral employer to persuade consumers not to buy the product of the struck employer. That is the law at the present time. If the persuasion is successful the neutral loses sales. Does this constitute restraint and coercion of the neutral employer? Under present law, it does not; but if the amendment shall be adopted, it will be necessary to go through a whole series of court actions again, and no one in the labor-management picture will know for many years where he stands. . . .

The Board has indeed held that to place an employer on a "We Do Not Patronize" list is to restrain and coerce him. The Court of Appeals for the Ninth Circuit set aside the Board's determination and pointed out that the union's conduct was "within the general area of protection of the first amendment guaranteeing free speech." [*Id.*]⁸

Several days after Senator Humphrey made his speech, Senator Dirksen offered an amendment containing all of the Administration's proposed changes to the NLRA, including the proposed amendment to § 8(b)(4). See 2 Leg.

⁸ Remarkably, the Board cites to Senator Humphrey's speech to support a claim that the opponents of the Administration's bill understood the phrase "restrain or coerce" as a term of act which "had been interpreted in other provisions of the statute to encompass nonpicketing appeals to consumers." NLRB Br. at 26. As the quotation in text shows Senator Humphrey voiced precisely the *opposite* understanding.

Hist. at 1071-72. Senator Goldwater explained the rationale for the "threaten, restrain or coerce" language of that amendment in terms quite similar to those Secretary Mitchell had originally used:

The biggest loophole in the present law is that it does not prohibit a union from using direct pressures upon an employer with the object of forcing him to cease using the products of, or to cease doing business with, another person. . . .

Threats of a strike or picketing made directly to an employer can be as effective as the strike or the picketing itself. [2 Leg. Hist. at 1079; emphasis added]

After brief debate, the amendment was defeated by a vote of 67-24. 2 Leg. Hist. at 1086.

Three days later, Senator McClellan introduced a free-standing amendment stating a variant of the Eisenhower administration's secondary boycott proposal. Senator McClellan's amendment would have made it an unfair labor practice for a union "to exert any economic or other coercion against . . . any person engaged in commerce" where the union is animated by a secondary objective. 2 Leg. Hist. 1193. Senator McClellan explained the reach of his amendment as follows:

The amendment, Mr. President, covers pressure in the form of dissuading customers from dealing with secondary employers. *That refers to establishing a picket line around a merchant's store, when the merchant handles the product of a company or of a manufacturing plant in which there is a strike.* In other words, that is a form of coercion against an innocent employer in an effort to compel the employer who has a strike on his hands to come to terms with the union.

* * *

Mr. President, that is the field and the area in which the amendment is designed to operate. Those

are the things it is designed to prevent. [2 Leg. Hist. at 1194; emphasis added]⁹

After brief debate, the McClellan amendment was defeated, 2 Leg. Hist. at 1198, and the Senate went on to pass the Labor Committee bill without any provision addressed to secondary boycotts, *see* 2 Leg. Hist. at 1257.

In the House, the labor reform bill followed a course quite similar to the course in the Senate, at least until the point of the floor debates. The Eisenhower administration's proposal was introduced in the House by the ranking Republican on the House Education and Labor Committee, Representative Kearns, *see* H.R. 7265, 86th Cong. 1st Sess. (1959), 1 Leg. Hist. at 586; Secretary Mitchell offered the same explanation for that proposal as he had presented to the Senate Committee, *see* Hearings Before a Joint Subcomm. of the House Comm. on Education and Labor, 86th Cong., 1st Sess. 5-6 (1959); the Democratic-controlled Committee reported out a bill which did not include the Administration's proposal, *see* H.R. 8342, 86th Cong., 1st Sess. (1959), 1 Leg. Hist. at 759; and the Republican members of the Committee dissented on the treatment of secondary boycotts on the grounds Secretary Mitchell had pressed, *see* H.R. Rep. 741, 86th Cong., 1st Sess. 97-98 (1959), 1 Leg. Hist. at 855-56.

Shortly before the House floor debate began, President Eisenhower gave a nationally broadcast address calling

⁹ The Board cites to Senator McClellan as one who "favored restricting all forms of pressure on secondary employers by unions," including the use of nonpicketing publicity. NLRB Br. at 25. But while Senator McClellan did "ma[k]e clear that his proposal would cover appeals to consumers of the secondary employer," NLRB Br. at 25 n.16, he also made clear, in the statement quoted in text (on which the Board relies) that his proposal was limited to appeals communicated through *picketing*. Thus the Board's claim that "various members of the Senate" favored a broader prohibition, *id.*, reduces to a claim that one Senator—Curtis—did so. And the Board fails to note that Senator Curtis introduced his own bill with language far broader than the Administration's bill. *See* S. 76, 86th Cong. 1st Sess. (1959).

for the enactment of "labor reform legislation" to "eliminate certain abuses" which the President identified. One of the "abuses" to which the President pointed was the coercive secondary boycott; President Eisenhower defined that abuse in the following terms:

Take [a] company—let us say, a furniture manufacturer. The employees vote against joining a particular union. Instead of picketing the furniture plant itself, unscrupulous organizing officials . . . picket the stores which sell the furniture this plant manufactures. The purpose is to prevent those stores from handling that furniture. [2 Leg. Hist. at 1842]

President Eisenhower concluded: "I want that sort of thing stopped. So does America." *Id.*

On the floor of the House, Representatives Landrum and Griffin offered a substitute for the House Labor Committee bill; that substitute included the Administration's proposed revision of § 8(b)(4). Representative Griffin offered a section-by-section analysis which repeated Secretary Mitchell's rationale for the "threaten, restrain, or coerce" language:

The courts . . . have held that, while a union may not induce employees of a secondary employer to strike for one of the forbidden objects, they may threaten the secondary employer, himself, with a strike or other economic retaliation in order to force him to cease doing business with a primary employer with whom the union has a dispute. This bill makes such coercion unlawful by the insertion of a clause 4(ii) forbidding threats or coercion against "any person engaged in commerce or an industry affecting commerce." [2 Leg. Hist. at 1523]¹⁰

The opponents of the Landrum-Griffin substitute returned to themes Senator Humphrey had developed on

¹⁰ See also 2 Leg. Hist. at 1568 (Rep. Griffin) (by "go[ing] directly," to a neutral employer and "threaten[ing] him with labor trouble or other consequences . . . the effect of the Act can be technically avoided. Our substitute would close this loophole.")

the Senate floor, and in so doing the House opponents escalated the rhetorical attack. For example, Representative Madden argued that the substitute "would prohibit any union from advising the public that an employer is unfair to labor, pays substandard wages, or operates a sweatshop . . ." 2 Leg. Hist. at 1552. And Representatives Thompson and Udall placed in the Congressional Record an "Analysis of the Landrum-Griffin Labor Reform Bill" in which they claimed that the bill "denies freedom of speech." 2 Leg. Hist. at 1576:

The bill provides that a union may not restrain an employer where an object is to require him to cease doing business with any other employer. The prohibition reaches not only picketing but leaflets, radio broadcasts, and newspaper advertisements, thereby interfering with freedom of speech.

Suppose that the employees of the Coors Brewery were to strike for higher wages and the company attempted to run the brewery with strikebreakers. Under the present law, the union can ask the public not to buy Coors beer during the strike. It can picket the bars and restaurants which sold Coors beer with the signs asking the public not to buy the product. It can broadcast the request over the radio or in newspaper advertisements. [*Id.*; see also e.g., 2 Leg. Hist. at 1689 (Representative O'Hara)].

Significantly, *none of the proponents of the Landrum-Griffin amendment claimed any intent to reach "pure speech"*; rather, the only conduct the proponents claimed their proposed subsection (ii) would reach (other than direct union threats of labor trouble of the type Secretary Mitchell had discussed from the very start) was consumer *picketing*, and even this claim was carefully circumscribed by the proponents. Thus, Representative Griffin, in a colloquy with Representative Brown, referred specifically to the hypothetical President Eisenhower had discussed in his national address—picketing a retail furniture outlet because of a dispute with a furniture manufacturer—and stated that under the Landrum-Griffin bill,

"[i]f the purpose of the picketing is to coerce or to restrain the employer of that second establishment to get him not to do business with the manufacturer—then such a boycott could be stopped." 2 Leg. Hist. at 1615:

MR. BROWN: . . . Would that same rule apply to the picketing at the customer entrances for instance of plumbing shops, or newspapers that might run the advertising of these concerns or radio stations that might carry their program?

MR. GRIFFIN: *Of course, this bill and any other bill is limited by the constitutional right of free speech. If the purpose of the picketing is to coerce the retailer not to do business with the manufacturer, whether it is plumbing . . . advertising or anything else, it would be covered by our bill. [Id.; emphasis added]*¹¹

After lengthy debate, the House adopted the Landrum-Griffin substitute amendment for the Committee bill. 2 Leg. Hist. at 1691.

Within a week after the House acted, Representative Thompson placed into the Congressional Record, for himself and Senator Kennedy, an "analysis" of the "secondary boycott . . . provisions" of the House bill. 2 Leg. Hist. at 1706. That analysis was almost verbatim the same as the Thompson-Udall memorandum, *see* p. 21, *supra*; indeed, the Thompson-Kennedy analysis used the same Coors Brewery hypothetical to make its case, *see* 2 Leg. Hist. at 1708.

Eventually, the House and Senate conferees produced a conference report which, insofar as relevant here, con-

¹¹ The Board describes the colloquy quoted in text as "indicat[ing] that § 8(b)(4)(ii) would . . . bar a union from putting indirect economic pressure on a secondary employer to cease doing business with a primary employer—by, for example, engaging in picketing that urged a total consumer boycott of the neutral's business." NLRB Br. at 26-27. But the colloquy does not refer to picketing as "an example" of "indirect economic pressure"; the colloquy—like President Eisenhower's address—was addressed entirely to consumer picketing.

tained the Eisenhower administration's proposed revision of § 8(b)(4) plus a "publicity proviso" drafted to meet the stated fears of the opponents of those revisions and providing that

nothing contained in [the section] shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.¹²

¹² The proviso's language, it is evident, was derived from language prepared by Senator Kennedy in response to Senator Dirksen's proposal that the Senate instruct its conferees to "concur in . . . the House amendment on boycotts and recognition picketing." 2 Leg. Hist. at 1375. While neither Senator Dirksen nor Senator Goldwater, who seconded the Dirksen proposal, spoke to the substance of the proposed § 8(b)(4)(ii), *see* 2 Leg. Hist. 1373-82, Senator Kennedy did so in a substitute proposal (on his own behalf and that of Senators McNamara, Morse and Randolph) for Senate instructions to its conferees. Senator Kennedy's proposal, as he explained, provided for "accepting the broad language of the House bill with respect to secondary boycotts . . . [with] a few wholly reasonable and necessary limitations;" Senator Kennedy emphasized that "[w]orkers would not be denied under the substitute the traditional right to ask the public not to patronize one who sells nonunion goods or goods of a manufacturer engaged in a labor dispute." 2 Leg. Hist. 1377; *see also* to the same effect at 1384.

The Senate did not act on either the Dirksen or the Kennedy proposal but, as stated in the text, the conferees did include a publicity proviso in § 8(b)(4)(ii) that follows the earlier Kennedy proposal with insignificant language changes. *See* 2 Leg. Hist. 1383 (setting out the statutory language Senator Kennedy proposed to the Senate); *Servette*, 377 U.S. at 56 n.15 (stating

Representative Griffin, in a "summary analysis" of the conference agreement presented to the House, noted that the House bill "prohibit[ed] secondary customer picketing" and that the conference bill

[a]dopts House provision with *clarification that other forms of publicity are not prohibited*, also clarification that picketing at primary site is not a secondary boycott. [2 Leg. Hist. at 1712; emphasis added]

Senator Kennedy, in presenting the conference bill to the Senate, elaborated:

Under the Landrum-Griffin bill it would have been impossible for a union to inform the customers of a secondary employer that that employer or store was selling goods which were made under racket conditions or sweatshop conditions, or in a plant where an economic strike was in progress. We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but we were able to persuade them to agree that the union shall be free to conduct informational activity short of picketing. In other words, the union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio, *and can carry on all publicity short of having ambulatory picketing in front of a secondary site.* [2 Leg. Hist. at 1432; emphasis added]¹³

2. (a) In light of the foregoing, had the publicity proviso not been added to the LMRDA's secondary boycott amendment in conference this would be a far easier case than, *e.g.*, *Catholic Bishop, supra*. There, the Court held that the NLRA does not cover church-operated

that the Court "attach[es] no significance to the" language differences between the two versions of the publicity proviso).

¹³ See also 2 Leg. Hist. 1388-89 (Sen. Kennedy); 1720-21 (Rep. Thompson) (conference agreement safeguards "[t]he right to appeal to consumers by methods other than picketing"); 1722 (Rep. Udall) (conference agreement "protect[s] the free speech right to appeal to consumers by non-picketing methods").

schools even though the statutory definition of the term "employer" states no such exception and even though nothing in the congressional debates suggested such an exception; the Court reasoned that "Congress simply gave no consideration to church-operated schools," 440 U.S. at 504, and that there was therefore no "affirmative intention of the Congress clearly expressed" to cover such employers, *id.*

In this case, absent the proviso, there would be only statutory language ("threaten, restrain or coerce") which is not easily read to proscribe reasoned persuasion, *see* pp. 9-13, *supra*; no indication by any proponent of the amendment of an intent to proscribe such speech; and several express statements by proponents that their proposal would not reach constitutionally protected expression.

The question here thus reduces to whether the publicity proviso—which "was the outgrowth of a profound concern that the unions' freedom to appeal to the public for support of their case be adequately safeguarded," *Servette*, 377 U.S. at 55—shows that subsection (ii) proscribes "secondary do-not-buy" messages to the general public where the primary and secondary do *not* have a producer-distributor relationship. The legislative history answers that question in the negative.

To begin with, the publicity proviso was added in conference to respond to fears the opponents had expressed, and not to undo anything the proponents had said. The language of the proviso was, to be sure, tailored to the paradigm case that President Eisenhower had posited and on which the entire congressional debate had focused, *viz.*, truthful communications urging members of the public not to do business with a retail seller of a struck manufacturer's product.¹⁴ For at least three reasons, the

¹⁴ The proviso was also drafted to make clear that communications which had the effect of inducing an employee of a secondary employer to cease working remain proscribed by subsection (i).

fact that the proviso was drafted to protect union "do-not-buy" communications concerning a distributor of struck products does not support the inference the Board would draw, *viz.*, that absent the proviso all such communications would have violated subsection (ii) and hence that like communications that concern a person who is *not* a "distributor" violate the Act.

First, the statements in the legislative history with respect to the proviso belie the Board's theory. Representative Griffin described the proviso as a "clarification that other forms of publicity are not prohibited." The use of the word "clarification" is itself significant and confirms that subsection (ii), standing alone, is not intended to reach "other forms of publicity." And the substantive explanation Representative Griffin offered for the proviso—that "other forms of publicity are not prohibited"—makes clear that the proviso was not understood as narrower than subsection (ii)'s prohibition.¹⁵ This latter point is further confirmed by the post-conference statements of Messrs. Kennedy, Thompson and Udall to the effect that the proviso enables unions to "carry on all publicity short of having ambulatory picketing in front of a secondary site." P. 24, *supra*.¹⁶

¹⁵ The Board attempts to disparage Representative Griffin's analysis as merely "a table summarizing the principal provisions" and offering "highlights rather than exegesis." NLRB Br. at 31, 32. But for the Board to prevail, it would not suffice to supply supposed omissions in the analysis as the Board attempts; it would be necessary to *override* Representative Griffin's actual words by: first, reading his description of the House bill as "prohibiting secondary consumer picketing" to mean "consumer appeals of any kind, including picketing"; second, wholly disregarding his description of the proviso as a "clarification"; and third, rewriting his statement that "other forms of publicity are not prohibited" to read "other forms of publicity which fall within the proviso's 'elaborate conditions,' [NLRB Br. at 22], are not prohibited." There can, of course, be no justification for altering or disregarding what Representative Griffin actually wrote.

¹⁶ The only hint in the legislative materials that anyone viewed the proviso in more limited terms is a cryptic statement in an

Second, in order to read the statute as the Board does it is necessary to assume: that before the proviso was added in conference, subsection (ii) proscribed all reasoned persuasion directed to those who might deal with any secondary employer; that the proponents of subsection (ii) desired to prohibit such speech (but kept their desire unstated); and that in conference the proponents yielded to the Kennedy-Thompson forces with respect to the types of situations that were on every legislator's mind and that had been repeatedly discussed—situations in which a union urges the public not to deal with a *distributor* of struck goods—but the proponents refused to yield, and preserved their original prohibition, with respect to a far less significant category of secondary employers never mentioned in the debates, those who are *not* distributors of the primary's product. This understanding of the legislative process is implausible at best.

Third and finally, the Board's reading of the statute rests on the theory that Congress viewed "do-not-buy" communications addressed to potential customers of secondary distributors as less objectionable, and more worthy of protection, than such communications addressed to customers of other types of secondary employers. The Board offers no rationale for that theory nor have we been able to conjure one up. More importantly, there is not one iota of evidence in the legislative history to suggest that any member of the 1959 Congress held such a quixotic notion. To the contrary, as we have seen, the proviso was uniformly described in far more sweeping terms.

analysis Senator Goldwater prepared stating that the conference agreement provided for "permitted but limited" nonpicketing publicity. 2 Leg. Hist. at 1857. But that analysis was introduced into the Appendix of the Congressional Record *after* the LMRDA had been signed into law and is, therefore, not properly part of its legislative history. In contrast, in the debate over the conference bill, during which Senator Kennedy made the statement quoted in text, while Senator Goldwater spoke he voiced no such qualification. See 2 Leg. Hist. at 1432.

(b) To conclude, as we urge, that subsection (ii) does not cover the type of communications specified as lawful in its proviso does not mean, as the Seventh Circuit has suggested, that the proviso amounts to "so much blather." *Boxhorn's Big Muskego Gun Club v. Electrical Workers Local 394*, 798 F.2d 1016, 1024 (7th Cir. 1986). Rather, this conclusion is sensitive to the very different purposes served by adding a proviso to a statutory prohibition.

Many provisos, of course, are intended to substantively affect the prohibition these provisos modify. But this is not the *only* function a proviso can serve. At times a proviso is added to allay the fears of important opponents of a bill or to reassure supporters with respect to the limited reach of the statute. The addition of such a proviso does not necessarily signify that the proponents believed that absent the addition the statute would have the consequences being alleged; indeed, often proponents agree to such an addition precisely *because* the proponents never intended their measure to have the sweep being imputed to it, do not believe that the statute would have such an effect, and view the proviso as simply confirming that which would be true in any event.

To the extent provisos of this type have a legal—as distinct from a political—function, it is simply to preclude by express words certain feared interpretations of the statute, thereby making assurance double sure, without in any way skewing the process of interpreting the basic prohibition in accordance with ordinary principles of statutory construction. Such proviso thus "add[] nothing to the existing law" but instead a "clarification of the law." *Mastro Plastics Corp. v. Labor Board*, 350 U.S. 270, 287 (1956). Indeed, provisos of this type typically are drafted to govern the actions of federal agencies and courts rather than the conduct of those regulated by the law.¹⁷

¹⁷ Cf. *Steelworkers v. Weber*, 443 U.S. 193, 244-47 (1979), in which Justice Rehnquist, dissenting, analyzed § 703(j) of Title VII of the Civil Rights Act of 1964 in precisely the manner set forth in text.

The body of the NLRA is replete with examples of both types of provisos. Section 8 of the Act contains no less than nine separate provisos. Some are plainly substantive in nature; for example, while § 8(a)(3) generally condemns discrimination by employers on the basis of union membership or nonmembership, a proviso to that section permits such discrimination where membership is required by a valid union security agreement. But other provisos in § 8 equally plainly do nothing more than *confirm* that which would be true in any event; for example, § 8(b)(4) contains, in addition to the publicity proviso, a proviso—added by the conferees in 1959—stating that "nothing contained in [the subsection] shall be construed to make unlawful, where not otherwise unlawful any primary strike or primary picketing." That proviso—which Representative Griffin described as another "clarification," 2 Leg. Hist. at 1712—was adopted solely "to make it clear that the changes in section 8(b)(4) do not overrule or qualify the present rules of law permitting picketing at the site of a primary labor dispute," H.R. Rep. No. 1147, 80th Cong., 1st Sess. 38 (1959), 1 Leg. Hist. at 942.

The publicity proviso is of a piece with this latter proviso. Like the proviso protecting primary activity—and unlike substantive provisos such as the one contained in § 8(a)(3)—the publicity proviso is, in terms, addressed to the Board and the courts and says that "nothing contained in [§ 8(b)(4)] shall be construed to prohibit publicity, other than picketing . . ." The publicity proviso was added at the same time as the primary-activity proviso and was described by Representative Griffin in the same terms, as a "clarification." And as we have seen, the legislative history shows that the publicity proviso was designed to play the same role as the primary-activity proviso: to "make . . . clear" the limited reach of subsection (ii) and thus meet the concerns voiced by the bill's opponents. For all these reasons, there is nothing anomalous in concluding that the public-

ity proviso offers express sanctuary for communications that in any event would not violate subsection (ii).¹⁸

In contrast, the Board's construction of the statute does carry with it a large anomaly. To read subsection (ii) as reaching all communications by a union to the general public urging the public to cease doing business with a secondary employer would obliterate the distinction between subsections (i) and (ii) of § 8(b)(4) and render the former subsection pure surplusage. For if, as the Board claims, appeals to consumers not to purchase goods from a secondary employer constitute restraint or coercion of the secondary, appeals to employees of the secondary not to perform certain work for the secondary would equally constitute restraint or coercion of the secondary. Thus, on the Board's theory any conduct condemned by subsection (i)—the proscription on "induc[ing] or encourag[ing]" employees—would be covered by subsection (ii), and subsection (i) would have no independent function in the statutory scheme.

(c) The Board's principal argument is that the analysis of the House bill that Representative Thompson and Senator Kennedy prepared (or more precisely copied from the Thompson-Udall analysis) and statements that these two legislators made during the course of the debates over the conference report with respect to the effect that the House bill would have had absent the publicity proviso, offer authoritative guidance as to the meaning of § 8(b)(4)(ii) of the House-passed Landrum-Griffin bill. Messrs. Kennedy and Thompson advanced two basic propositions in various forms:

1. "The prohibition [of the House bill] reaches not only picketing but leaflets, radio broadcasts and newspaper advertisements, thereby interfering with freedom of speech." 2 Leg. Hist. at 1708.

¹⁸ See also *Tree Fruits*, 377 U.S. at 69 ("It does not follow from the fact that some coercive conduct was protected by the proviso, that the exception 'other than picketing' indicates that Congress had determined that all consumer picketing was coercive").

2. "[T]he union can hand out handbills at the shop, at the place advertisements in newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory picketing in front of a secondary site." 2 Leg. Hist. at 1432.

With respect to the second of these propositions, describing the effect of the proviso, Senator Kennedy and Representative Thompson plainly did speak authoritatively because they were *proponents of the conference report*. That proposition, however, is irreconcilable with the Board's position herein, that the bill, as it came out of the conference and was enacted, outlaws the nonpicketing appeals made by the union in this case.

The situation is otherwise with respect to the first proposition. For, insofar as Senator Kennedy and Representative Thompson were characterizing the House bill—or were endorsing characterizations made by the bill's opponents during the House debate—they could not speak authoritatively. Because they were *not the authors, or even supporters*, of the "threaten, coerce, or restrain" language in the Landrum-Griffin bill, Messrs. Kennedy and Thompson could only *speculate* as to what that language might mean; and as opponents tend to do, they feared the worst. As the Court said in *Tree Fruits*, "we have often cautioned against the danger, when interpreting a statute, of reliance upon views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach." 377 U.S. at 66. The Board disregards this lesson in asking this Court to accept the Kennedy-Thompson views as to what the prohibitory language of § 8(b)(4)(ii) means, and to repudiate the narrower explanation of the language's sponsor, Representative Griffin.

II. THE CONSTITUTIONAL QUESTION

The constitutional question in this case is whether the First Amendment permits a blanket prior restraint—through temporary and permanent injunction, see NLRA

§§ 10(c) & 10(1)—on non-picketing communications by unions truthfully informing members of the general public about a particular employer's labor conditions and about the business relationship between that employer and other employers and urging the public not to trade with the latter. We submit that the First Amendment does not permit such a ban.

A. Two critical aspects of the First Amendment question before this Court serve to frame the inquiry.

First, reading the statute as the Board now does, the NLRA *entirely bans all means of publishing* a message such as the one at issue in this case; *viz.*, by newspaper, radio, book, or even by word of mouth, as well as by handbilling. Both the NLRB and the Employer expressly so recognize, and base their primary defense of the statute on the assertion that it is the *content* of the Union's communication in this case, and not its format or mode of distribution, that justifies the absolute prohibition.¹⁹ What is at issue then is whether the govern-

¹⁹ Both the Board and the employer do fleetingly suggest that handbilling in support of a boycott at the site of a dispute, unlike other forms of distributing written information or requests for support, can be considered *coercive of the listener*, and prohibited on that ground even if the content of the message is otherwise fully protected by the Constitution. Board Br. at 36 n.25; Employer Br. at 28 n.21. As we have already seen, however, pp. 6-7, *supra*, this Court consistently has held for at least fifty years that approaching fellow citizens on the street or, even, at their own homes with handbills, or requests for financial support of one's cause is at the core of the First Amendment's protection of speech. That principle has been reaffirmed in numerous cases in recent years. See *e.g.*, *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980).

Of particular interest in this regard are the cases in which members of a religious or charitable organization approach members of the public with a request for a contribution, or in order to sell a political or religious tract. *E.g.*, *Cantwell v. Connecticut*, 310 U.S. 296 (1950); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976); *Village of*

ment may *ban a message entirely because of its content*, however that message is phrased and however conveyed.

Second, this complete ban on publication cannot be justified on the ground that the message calls for an unlawful response or is otherwise part of an overall unlawful course of conduct. As far as the Act is concerned, each member of the general public may make marketplace decisions either so as to maximize his own economic satisfaction or, instead, so as to provide support for labor unions and their objectives.²⁰ By the same token, a mall

Schaumburg, supra. In those cases, the individual making the appeal is not only physically present, but is requesting an immediate financial commitment from the listener. This Court, however, has not viewed such an in-person request, without more, as involving a conduct element sufficient to permit a total ban on the activity, and has taken an exceedingly narrow view of the authority of government even to regulate such solicitation to protect homeowners. *Village of Schaumburg, supra*. There is no conceivable basis for concluding that an individual standing in a public place simply handing out fliers, without harassing or pressuring anyone—and, *indeed* without demanding of the recipients *any* direct or binding verbal or financial commitment of any kind—can be said to be engaging in inherently coercive conduct, while a stranger soliciting contributions or selling religious tracts on one's doorstep cannot.

Indeed, the central element which has led this Court to view picketing as exerting a sufficient coercive effect on listeners to permit close regulation is not the mere physical presence of the pickets, but the patrolling nature of picketing that is intended to, and in fact may, create a symbolic barrier to entry analogous to an actual picket fence, or wall. The patrolling aspect of picketing was stressed in *Hughes v. Superior Court, supra*, as a central reason why there are "compulsive features inherent in picketing, beyond the aspect of mere communication as an appeal to reason." 339 U.S. at 468.

²⁰ Given the existence of a labor dispute, the antitrust laws are not implicated here. See *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938); *United States v. Hutcheson, supra*. Moreover, so far as we are aware, there is no case in this Court suggesting that "do not buy" appeals *addressed to members of the general public* are, or even could constitutionally be, reached by the antitrust laws.

owner—in response to public opinion or out of any other consideration—is legally free to take steps to protect the labor standards of employees doing construction work at the mall.²¹ Thus, the NLRA as construed by the Board does not ban the response the Union sought from members of the public or from the mall owner, only the circulation by the union to the public of the underlying information and arguments needed to intelligently exercise their lawful options.

Moreover, it is only labor unions, and not any other individuals or groups, which are subject to this restraint. Under the Act, a decision by an organization other than a labor union to appeal to—or even to require—its members not to purchase from a business in the position of the mall stores in this case is not unlawful, nor is a request by any other person or group for purely voluntary, individ-

²¹ Thus, the Employer is entirely offbase in maintaining that the handbill in this case “initiated, evidenced, or carried out” an unlawful course of conduct, and may therefore be proscribed as an “incidental” part of that overall scheme. Employer Br. at 26, quoting *Giboney v. Empire Storage Co.* 336 U.S. 490, 502 (1949) and *Longshoremen v. Allied International, Inc.*, 456 U.S. 212, 226 (1982).

In *Giboney*, there were two different respects, neither present here, in which the overall course of conduct engaged in by the union was unlawful under the Minnesota criminal law prohibiting restraints of trade. First, the object of the union’s activity was to induce one company to cease selling to other companies with which there was a primary dispute, where the secondary company would violate Missouri’s trade dispute law if it acquiesced in that demand. 336 U.S. at 492. Second, as the opinion stressed repeatedly, the union in that case “provided for enforcement of its rule by sanction against union members who cross picket lines.” 336 U.S. at 504; see also *id.* at 493. That compulsion was the means of enforcing an agreement or combination, itself illegal under Missouri law, among union members to abstain from delivering to the secondary company. 336 U.S. at 495, 497. *Allied International* also dealt with union speech directed at inducing an unlawful secondary strike. 456 U.S. at 226.

ual support by members of the public banned.²² Moreover, no one—not the affected employers or those who agree with those employers’ business arrangements—are limited on making “do buy” communications.

B. Given the nature of the First Amendment issue in this case, its resolution based upon established doctrine is straightforward: The statute as construed by the Board violates nearly every firmly established precept of the First Amendment at once, and cannot stand.²³

“Prior restraints on speech and publication are the most serious and the least tolerable infringement on first amendment rights.” *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976). And this Court has squarely rejected “the claim that *the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the in-*

²² That groups other than labor unions often engage in “do not buy” campaigns in order to protest employment conditions is evident from the cases in this Court, as well as from common experience. See *New Negro Alliance, supra*; *Talley v. California, supra*; *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). (While the boycott in *Claiborne Hardware* was in part directed at political reform, one purpose was to promote the hiring of blacks by the boycotted businesses. *Id.* at 900.)

²³ The Employer (and to a lesser degree the Board) intimate that the First Amendment problem in this case could be solved by distinguishing between publications directed at members of the public which expressly make a “do not buy” request, and communications which provide relevant information but do not make such an appeal. Employer Br. at 29-30; NLRB Br. at 43. Even if one could read the statute that way, there is an insurmountable constitutional problem with such a distinction. The First Amendment generally protects “the opportunity to persuade to action, not merely to describe facts,” *Thomas v. Collins*, 323 U.S. at 537, and does so in large part because the distinction the Employer offers is one impossible to draw without seriously impeding the ability to engage in even the most abstract or fact-oriented speech: “The vice is not merely that invitation . . . is speech. It is also that its prohibition forbids or restrains discussion which is not or may not be invitation,” *id.* at 535.

junctive power of a court." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 420 (1971) (emphasis added). That, of course, is the precise interest invoked by the Employer here and the Labor Board on his behalf. It bears emphasis in this regard that while the Board talks of the "governmental interest in preventing the spread of labor discord to neutral, secondary employers", NLRB Br. at 34, the Union is "spreading labor discord" here only by: truthfully communicating to the members of the general public the facts about labor conditions at the primary and about the business relations between the primary and the secondaries so that each individual receiving those facts and the supporting arguments may judge the situation for himself; and urging each such individual, if he agrees with the union's position, to show his moral (or social) disapproval of the secondary's conduct by not buying from the secondary.

Indeed, even absent a prior restraint, this Court's "recent decisions demonstrate that state action to punish the publication of *truthful* information seldom can satisfy constitutional standards. . . . [Government] officials may not punish publication of [such] information, absent a need to further a state interest of the highest order." *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102-03 (1979) (emphasis added). The passage just quoted from *Keefe* demonstrates that protecting businessmen from public criticism is not such an interest.²⁴

²⁴ It bears note that constitutional protection has even been extended to the publication of *untruthful* information in order to "assure freedom of speech and press that 'breathing space' essential to their fruitful exercise." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974). To be sure, the degree of such protection varies based upon the nature of the falsehood and the public interest in the speech. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

Because this case involves only truthful speech, we do not address the question whether and to what degree Congress could provide a remedy for employers injured by *untruthful* speech by a union which has the purpose or effect of triggering a consumer boycott.

Advocacy of lawful actions—and, indeed even some advocacy of unlawful action, see *Brandenburg v. Ohio*, 395 U.S. 494 (1969)—is no less protected by the First Amendment than truthful statements of fact. Again, *Organization for a Better Austin* is directly in point:

In sustaining the injunction [against handbilling] the Appellate Court was apparently of the view that petitioners' purpose in distributing their literature was not to inform the public, but to "force" respondent to sign a non-solicitation agreement. *The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment.* Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. See *Schneider v. State*, *supra*; *Thornhill v. Alabama*, 310 U.S. 88 (1940). Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communications need not meet standards of acceptability. [402 U.S. at 419].

This is but one illustration of the First Amendment's hostility to government censorship of speech on the basis of its content, viewpoint, or the identity of the speaker:

The First and Fourteenth Amendments remove "governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that uses of such freedom will ultimately produce a more capable citizenry and more perfect polity. . . ." The First Amendment's hostility to content-based regulation extends . . . to restrictions on particular viewpoints [as well as] to prohibition of public discussion of an entire topic. [*Consolidated*

Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 534, 537 (1980).] ²⁵

C. In view of the First Amendment principles just summarized, it is not surprising that neither the Board nor the Employer in this case maintains that the Act as construed by the Board can survive judicial scrutiny if these usual precepts apply. Rather, both devote their primary attention to the contention that this Court either already has, or now should, carve out for special, less favored First Amendment treatment a category of "labor speech," and should apply to that category of speech the mode of analysis developed for "purely commercial speech." As we proceed to show the arguments in that regard cannot withstand analysis.

1. To begin with, the Board is wrong in claiming that *NLRB v. Retail Store Employees*, 447 U.S. 607 (1980) ("*Safeco*"), is controlling here. See NLRB Br. at 33-35. That case involved *picketing* as contrasted to handbilling and other forms of "pure speech." The Board's fundamental position on the constitutional question in *Safeco* was that such a prohibition on picketing is valid because:

"[W]hile picketing is a mode of communication it is inseparably something more and different." Because of the "compulsive features inherent in picketing," picketing aimed at preventing effectuation of a constitutionally permissible legislative policy may be constitutionally enjoined. As the dissenting opinion below concluded, the statutory prohibition in this case does not raise "substantial first amendment questions" for "read as barring only picketing urging [a] total consumer boycott . . . the statute strikes

²⁵ This Court has treated the ban on distinctions based on viewpoint—as opposed to identity or content—as, for all intents and purposes, an absolute. *Perry Education Association v. Perry Local Educators' Assn.*, 460 U.S. 37, 49 (1983); *Cornelius v. NAACP Def. & Educ. Fund*, — U.S. —, 105 S. Ct. 3439, 3451 (1986) ("the Government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject").

narrowly at those 'inherently compulsive features' present when consumers must cross a line.'" [NLRB Br. in *Safeco* at 22-23; citations omitted]

It was this view of the limited constitutional protection accorded picketing as opposed to other modes of communication that was adopted by the Court. Justice Powell, speaking for four members of the Court concluded that "[a]s applied to *picketing* that predictably encourages consumers to boycott a secondary business, §§ 8(b)(4)(ii)(B) imposes no impermissible restrictions upon constitutionally protected speech." 447 U.S. at 616 (emphasis added). Justice Blackmun, concurring in the result, stated that "[m]y vote should not be read as foreclosing an opposite conclusion where another statutory ban on *peaceful picketing*, unsupported by equally substantial governmental interests, is at issue." *Id.* at 618 (emphasis added). And while neither of the foregoing opinions elaborates on the legal significance of the repeated references to "picketing," Justice Stevens, concurring in the result, placed *Safeco* in line with its antecedents, and in line with the arguments made to the Court. After quoting the passage in *Bakery Workers v. Wohl*, 315 U.S. 769, 776-77 (1942) (Douglas J., concurring) that begins "Picketing by an organized group is more than free speech . . .," Justice Stevens went on to say:

Indeed, no doubt the principal reason why handbills containing the same message are so much less effective than labor picketing is that the former depend entirely on the persuasive force of the idea.

The statutory ban in this case affects only that aspect of the union's efforts to communicate its views that calls for an automatic response to a signal, rather than a reasoned response to an idea. And the restriction on picketing is limited to geographical scope to sites of neutrals in the labor dispute. Because I believe that such restrictions on conduct are sufficiently justified by the purpose to avoid embroiling neutrals in a third party's labor dispute, I agree

that the statute is consistent with the First Amendment. [447 U.S. at 619, emphasis added.]

The Board argues that *Safeco* cannot be distinguished as a picketing case because the statute at issue there (and here) "does not regulate the conduct aspect of picketing" but instead regulates "the message that the union seeks to convey." NLRB Br. at 35, 36. But as the Board ultimately concedes in the final footnote of its brief, *see id.* at 45 n.30, that was equally true of each of the Court's prior picketing cases beginning with *Giboney, supra*, and *Hughes v. Superior Court, supra*; in *Hughes*, for example, the picketing was enjoined solely because of its message (*viz.*, the fact that the picketers were demanding that the merchants engage in "affirmative action" hiring, 339 U.S. at 461-62).

The lesson of those cases is that because it inextricably combines speech and conduct, "picketing is qualitatively different from other modes of communication," *Babbitt v. Farm Workers*, 442 U.S. at 311 n.17, and that the government is therefore free to regulate picketing based on content even though such regulation of "pure speech" would not be permitted. *Safeco* thus falls squarely within the line of *picketing* cases and is not controlling here.²⁶

²⁶ Nor does the one sentence *dictum* in *NAACP v. Claiborne Hardware Co., supra*, relied upon by the Board and the Employer stand for the view that union "do not buy" appeals are analogous to "commercial speech." That sentence reads as follows:

Secondary boycotts and picketing by labor unions may be prohibited, as part of "Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife." *NLRB v. Retail Store Employees Union, supra*, at 617-618 (Blackmun, J., concurring part). *See Longshoremen v. Allied International, Inc.*, 456 U.S. 212, 222-223, and n.20. [458 U.S. at 912.]

The foregoing, quite obviously, summarizes settled law in this Court and does not purport to make new law. Since, as we have just reiterated, an essential tenet of that settled law is that picketing

2. The determinative question, then, is whether this Court should, *for the first time*, define some category of "labor speech," NLRB Br. at 37, to which only minimal constitutional protection will be extended. Neither the Employer nor the Board is able to justify such a rule.

(a) The Board begins by contending that "certain categories of speech occupy a less central position in relation to First Amendment values than speech on issues of public concern" and are therefore subject to "content-based regulation." NLRB Br. at 36. But all of the cases on which the Board (and the Employer) rely involve a *single* category of speech: commercial speech. And this Court has from the first treated commercial speech as *sui generis*.²⁷

is entitled to less First Amendment protection than handbills, newspaper advertisements and other forms of communication, the citation to *Safeco* in *Claiborne Hardware* is of no aid to the Board here. And, since as Justice Harlan reminded in *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 386 (1969), "No cosmic principles announce the existence of secondary conduct, condemn it as an evil, or delimit its boundaries," it is necessary to determine what *Claiborne Hardware's* reference to "secondary boycotts" means.

In so doing, we are aided by the supporting citation to *Allied International, Inc., supra*, where the Court stated that the "secondary boycott provisions in § 8(b) (4) prohibit a union from inducing employees to refuse to handle goods with the object of forcing any person to cease doing business with any other person," 456 U.S. at 222. Thus, *Allied Industrial* is simply the last in the line of cases that began with *Giboney, supra*, and that hold that the First Amendment is not offended by the prohibition of union inducements to employees to engage in *unlawful work stoppages*. Since these cases, and *Safeco*, were the only secondary boycott cases decided until the time of *Claiborne Hardware*, there is no warrant for reading the Court's *dictum* there as going beyond the holdings in those cases to reach this one.

²⁷ The Board cites three other cases to support its general claim that "certain categories of speech occupy a less central position in relation to First Amendment values." But one of those cases, *Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc., supra*, involved speech that was *false* and that was not addressed to the general public and for those reasons was deemed *unprotected* against a

As we have previously noted, for many years commercial speech was deemed to be outside of the First Amendment altogether. In *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 762 (1976), this Court overruled that doctrine because the Court was persuaded that "speech which does 'no more than propose a commercial transaction' is not 'so removed from any 'exposition of ideas' . . . that it lacks all protection.'" At the same time, this Court recognized that "[t]here are commonsense differences between speech that does 'no more than propose a commercial transaction' and other varieties," and that although those differences "do not justify the conclusion that commercial speech is valueless and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary . . ." *Id.* at 771-72 n.24. In *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978), the Court elaborated on this latter point:

To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to

claim for damages. Thus, the First Amendment question there is distinct from that here and from the one that would be presented if truthful speech about the creditworthiness of a particular business that is made generally available were subject to a prior restraint. *Cf. Lowe v. SEC*, 472 U.S. 181, 210 (1985) "[B]ecause we have squarely held that the expression of opinion about a commercial product such as a loudspeaker is protected by the First Amendment, *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485 (1984), it is difficult to see why the expression of an opinion about a marketable security should not . . . be protected").

The other two cases the Board cites, *FCC v. Pacifica Foundation*, 438 U.S. 726 (1976), and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), involved regulation of the time, place and manner in which "indecent" speech may be communicated. Neither of these latter two cases involved an attempt to ban speech entirely based on its content, and thus the cases do not advance the inquiry here; indeed the Board itself does not claim that the speech at issue here is in any way analogous to "indecent" speech.

the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression. [*Id.* at 456]

We do not understand the Board or the Employer to contend that speech of the kind involved here is commercial speech. That certainly is not the case: as the quotations from *Va. Pharmacy Bd.* and *Ohralik* make clear, the Court from the first has defined commercial speech as "speech proposing a commercial transaction," and the Union in this case clearly was not selling anything to anyone. Rather, the attempt here is to begin the "leveling process" against which this Court warned in *Ohralik*, *supra*, by seeking to extend the regime providing a "limited measure of protection" afforded commercial speech to another category of speech, one that heretofore has been held to be entitled to full constitutional protection.

(b) The Board's claim in this regard is that labor speech and commercial speech share various attributes and that both should therefore receive limited First Amendment protection. NLRB Br. 38. But none of the three "commonsense differences" between fully protected speech and "speech [like commercial speech] of less central concern to the First Amendment" identified by the Board, NLRB Br. at 37, 39, cuts an accurate general line of demarcation between speech properly accorded limited First Amendment protection and speech entitled to full protection.

As this Court noted in first referring to "the greater objectivity and hardiness of commercial speech," the fact that commercial speech is "hardy" and "verifiable", NLRB Br. at 37, explains why government may *closely regulate* commercial messages without affecting "the

flow of truthful and legitimate commercial information", *Va. Pharmacy Bd.*, 425 U.S. at 771 n.24. These two aspects of commercial speech are not, however, the reason why, on occasion, commercial speech is subject to complete suppression. See *Posadas de Puerto Rico Associates v. Tourism Co.*, — U.S. —, 106 S.Ct. 2968 (1986). Nor can it be true that all hardy, verifiable speech is entitled to only limited First Amendment protection. If that were the rule, much political speech, for example, such as speech by candidates for public office about their opponents, would lose its full constitutional protection: Such speech is surely hardy, since candidates can be counted upon to speak about each other regardless of the extent of government regulation. And such speech is largely verifiable, since candidates' records are usually a matter of public information.

That a communication "takes place in an area traditionally subject to government regulation," NLRB Br. at 37, is certainly not a basis for casting speech into the second rank of First Amendment protection. The nature of the regulation of which a speech restriction is a part may indeed be relevant in assessing the strength of the government's interest justifying a particular abridgment. And speech is not protected if the communication is simply an incidental aspect of a larger pattern of activity that is unlawful by reason of valid governmental regulation. See pp. 33-35 & n.21, *supra*. But to suppose that the government may relegate speech that is *not* part of any independently unlawful course of action to a lesser level of constitutional protection on the ground that the topic covered relates to a matter otherwise regulated is to invert the roles of the Constitution and of lawmaking under the Constitution. Under such an approach, "the scope of freedom of speech and the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." *Landmark Communications v. Virginia*, 425 U.S. 829, 844 (1978). Cf. *Lowe v. SEC*, *supra*.

Nor does the claim that labor speech is entitled to a minimal degree of constitutional protection because "the gain sought and the action requested are both economic," NLRB Br. at 39, withstand scrutiny.

The marketplace of ideas would be far poorer—and the protection afforded by the First Amendment quite meager—if the only persons who could claim the Amendment's mantle were disinterested speakers, *viz.*, persons who choose to speak without having any self-interest in what they choose to say. The fact of the matter is that most speech is animated by self-interest either in the sense that the speech itself is for sale (as is true of books, newspapers and the like) or in the sense that the speaker has an interest in the outcome of the public debate in which he is participating. Indeed it is difficult to imagine how a speaker could be disinterested in most political, social or economic issues confronting the polity, since how those issues are resolved invariably affects the well-being of the nation and hence of each individual citizen.

That being so it is hardly surprising that this Court's cases cannot be squared with the cramped view of the First Amendment that underlies the Board's submission. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), makes our precise point by affording full protection to the speech of a bank on a proposed constitutional amendment which would have imposed a graduated income tax on all Massachusetts citizens; the fact that the bank had an economic interest in defeating that referendum (and preventing any diminution in the amount of money available to its customers to deposit) did not enter into the Court's decision. The *Bellotti* Court reasoned that to "frame[] the . . . question" in terms of the rights of the bank would "pose[] the wrong question" and that the relevant question was whether the state prohibition on the speech "abridges expression that the First Amendment was meant to protect." *Id.* at 775-76. See also, *eg.*, *Consolidated Edison Co. v. Public Serv. Comm'n*, *supra* (utility's speech on the subject of nuclear power fully

protected by the First Amendment without regard to the utility's economic interest in promoting favorable attitudes towards nuclear power); *Pacific Gas & Electric Co. v. Public Utility Comm'n*, — U.S. —, 106 S.Ct. 903, 907-08 (1986) (business newsletter "receives the full protection of the First Amendment").

(c) Putting those points to one side, and without conceding for a moment that the Board has in other respects accurately characterized "labor speech," the essence of the matter is that such speech and "commercial speech" are fundamentally different in the only respect that truly matters: the "hawking of wares," *First National Bank of Boston v. Bellotti*, 435 U.S. at 784, n.20, has only an attenuated relationship to "any 'exposition of ideas,'" *Va Pharmacy Bd.*, 425 U.S. at 762, and thus is "of less constitutional moment than other forms of speech," *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 562, n.5 (1980); in contrast, "labor speech" has long been understood to be closely connected with the core values of the First Amendment.

First in *Thornhill*, 310 U.S. at 102, and recently in *First National Bank of Boston v. Bellotti*, 435 U.S. at 776, this Court has emphasized that "[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." And the Court likewise has recognized that "labor relations"—that is, the relationship between labor and capital in this society, the division of wealth between those two groups, and the allocation of power between them—"are not matters of mere local or private concern." *Thornhill*, 310 U.S. at 103. Rather, the manner in which these fundamental questions of political economy are resolved goes far to determining the nature of the society in which we live. Thus, "[f]ree discussion concerning the conditions in industry and the causes of labor disputes appear to us

indispensable to the effective intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Id.*²⁸

As the *Thornhill* Court also perceived communications focused upon *particular* labor disputes are no different in this respect from more general discussions of labor issues. For one thing, to characterize labor disputes as concerning only narrowly economic issues misunderstands labor relations. The most important aspect of a collective agreement is the "effort to erect a system of industrial self-government", *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 580 (1960), as a means of enabling workers to participate in decisionmaking with respect to their terms and conditions of employment. To characterize this effort to create industrial relations which are fairer to and more respectful of the human interests of employees as merely "economic" ignores the fundamental, noneconomic social and political values involved. Moreover, labor disputes arise over a wide range of issues of clear public import; *e.g.*, discrimination, privacy, and health and safety. In many instances, these issues began in the workplace and end up on the floor of Congress, or in the walls of the state legislatures.

Similarly, the interest of the *listeners* to a "do-not-buy" appeal such as the one in this case are entirely different than the interest of a listener to speech proposing a commercial transaction. Whereas commercial speech is of value to a listener insofar as it enables him to maximize his economic self-interest, "labor speech" is of value to a listener because it enables him to make an informed decision as to whether to *override* his own immediate economic self-interest in purchasing a product at the most convenient location and at the lowest price

²⁸ Indeed, speech about labor disputes is of far greater "public concern," NLRB Br. at 36, than other types of speech to which the Court has extended full constitutional protection such as critical evaluations of commercial products. *Cf. Bose Corp. v. Consumers Union, supra*; *Lowe v. SEC, supra*.

in favor of assisting workers seeking to improve their conditions of employment; labor speech, in contrast to commercial speech, is thus social (or moral) speech. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) and cases there cited.

Necessarily, "[t]he union members plea . . . is . . . directed to the public's sentiments towards labor's larger struggle, which the individual dispute is, in fact, the first step in resolving."²⁹ The complex of social, moral and economic considerations as to what sort of a society we wish to live in and how we wish to balance our self-interest against our common interest in our fellow man raised by such an appeal has nothing to do with the narrow range of commercial interests raised by an offer to buy or sell and by speech incidental to such an offer.

Indeed, the paradox inherent in the view of the First Amendment being advanced by the Employer and the Labor Board here is that the government is permitted to keep members of the public in the dark about certain social, political, and economic considerations that might influence their patterns of consumption, while permitting a free flow of strictly commercial speech to reach them. The effect is to channel the public's marketplace choices toward the narrowly self-interested, and in that way to make for citizens a choice regarding their personal priorities and, cumulatively, society's priorities that, under the First Amendment, the polity has the right, knowledgeably rather than ignorantly, to make for itself.

In short, the argument on the other side reduces to the claim that by affording some limited degree of First Amendment protection to "the hawking of wares," the Court has thereby overruled *Thornhill* and its progeny and greatly narrowed the category of speech that was, even when *Valentine v. Chestersen*, *supra*, reigned, un-

²⁹ Goldman, *The First Amendment and Nonpicketing Labor Publicity Under Section 8(b)(4)(ii)(B) of the National Labor Relations Act*, 36 Vand. L. Rev. 1469, 1497 (1983).

derstood to be entitled to full constitutional protection. That argument collapses of its own weight.³⁰

(d) All of the foregoing is confirmed—and the invalidity of the Board's argument established—by *Organization for a Better Austin*, *supra*. That case involved, as summarized by Board counsel, "leafletting . . . urging

³⁰ The Board's reliance on *Va. Pharmacy Bd.* as establishing the equivalence of "labor speech" and "commercial speech" could not be more misplaced. In *Va. Pharmacy Bd.* the Court considered various possible grounds on which commercial speech might be viewed as outside the First Amendment; one such ground was that "the advertiser's interest is a purely economic one." 425 U.S. at 762. The Court found that argument unpersuasive because: "The interest of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome. See e.g., . . . *Thornhill v. Alabama*, 310 U.S. at 102." 425 U.S. at 762.

In other words, the Court in *Va. Pharmacy Bd.* assumed that labor speech qualifies for full First Amendment protection; that was one of the considerations that persuaded the Court to extend limited protection commercial speech. And the Court equated the two types of speech only in the context of rejecting the claim that the advertiser's economic interest disqualifies his speech from constitutional protection.

The Board's reliance on *NLRB v. Gissell Packing Co.*, 395 U.S. 575 (1969) is equally misplaced. All that *Gissell* teaches is that an employer's threat to take unlawful action is not protected speech, and that in determining whether a particular statement amounts to a threat, the Labor Board is entitled to "take into account the economic dependence of the employees on the employers." *Id.* at 617, 619.

There is nothing in the commonsense principle that in considering the likely intent and impact of words, the dominating relationship of the speaker over the listener is of relevance, that suggests that less than full First Amendment protection was applied to "labor speech" in *Gissell*. And, in any event, this case, and the class of union speech situations that it represents, involves no pre-existing relationship of any kind between the speaker and the listeners. Compare *Giboney*, *supra*, which did stress the relationship between a union and its own members in evaluating the protection accorded picketing directed at those members.

consumers to boycott a real estate broker who had engaged in various racially discriminatory tactics to increase his real estate business," NLRB Br. at 44 n.29; the Court held the leafletting to be constitutionally protected and overturned an injunction that had been issued below. See pp. 35-37, *supra*.

While it is true that *Organization for a Better Austin* involved a dispute in the real estate market rather than the labor market, no reason appears why the latter is inherently more economic or commercial than the former; if anything, it is less so. And disapproval of a business on the basis of who it sells real estate to, and how it does so, is not inherently higher on the ladder of First Amendment values than disapproval of another business on the basis of who it rents its store from, and what labor policies that individual and his other tenants follow.

Nor can the fact that the immediate dispute here concerned wages and fringe benefits, while the dispute in *Organization for a Better Austin* concerned racial issues, be the distinguishing factor. *NAACP v. Button*, 371 U.S. 415, 444-45 (1963) ("That the petitioner happens to be engaged in activities of expression and association on behalf of the rights of Negro children to equal opportunity is constitutionally irrelevant to the ground of our decision.")

Thus, to characterize the leafletting in *Organization for a Better Austin* as involving "wholly political ends" NLRB Br. at 45 n.29, while insisting that the appeal in this case involves purely economic ends is only to prove that the distinction between speech relating to other social concerns and "labor speech" is impossible to draw in a principled manner, and therefore is not one upon which First Amendment rights should hinge.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

MARK F. KELLY
401 South Albany
Tampa, Florida 33606

LAURENCE J. COHEN
1125 15th Street, N.W.
Washington, D.C. 20005

DAVID M. SILBERMAN
LAURENCE GOLD
(Counsel of Record)
815 16th St., N.W.
Washington, D.C. 20006
(202) 637-5390

Of Counsel:

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

MARSHA BERZON
177 Post Street, Suite 300
San Francisco, CA 94108

APPENDIX A

TEXT OF THE HANDBILL AT ISSUE IN THIS CASE

PLEASE DON'T SHOP AT EAST LAKE SQUARE
MALL PLEASE

The FLA. GULF COAST BUILDING TRADES COUNCIL, AFL-CIO, is requesting that you do not shop at the stores in the East Lake Square Mall because of The Mall ownership's contribution to substandard wages.

The Wilson's Department Store under construction on these premises is being built by contractors who pay substandard wages and fringe benefits. In the past, the Mall's owner, The Edward J. DeBartolo Corporation, has supported labor and our local economy insuring that the Mall and its stores be built by contractors who pay fair wages and fringe benefits. Now, however, and for no apparent reason, the Mall owners have taken a giant step backwards by permitting our standards to be torn down. The payment of substandard wages not only diminishes the working person's ability to purchase with earned, rather than borrowed, dollars, but it also undercuts the wage standard of the entire community. Since low construction wages at this time of inflation means decreased purchasing power, do the owners of East Lake Mall intend to compensate for the decreased purchasing power of workers of the community by encouraging the stores in East Lake Mall to cut their prices and lower their profits?

CUT-RATE WAGES ARE NOT FAIR UNLESS
MERCHANDISE PRICES ARE ALSO CUT-RATE.

We ask for your support in our protest against substandard wages. Please do not patronize the stores in the East Lake Square Mall until the Mall's owner publicly promises that all construction at the Mall will be done using contractors who pay their employees fair wages and fringe benefits.

IF YOU MUST ENTER THE MALL TO DO BUSINESS, please express to the store managers your concern over substandard wages and your support of our efforts.

We are appealing only to the public—the consumer. We are not seeking to induce any person to cease work or to refuse to make deliveries.

REPLY BRIEF

Supreme Court, U.S.
E I L E D
JAN 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1986

THE EDWARD J. DEBARTOLO CORPORATION,
Petitioner,

v.

FLORIDA GULF COAST BUILDING TRADES
COUNCIL, AFL-CIO,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

LAWRENCE M. COHEN
MARTIN K. DENIS
FOX AND GROVE, CHARTERED
233 South Wacker Drive
Sears Tower-Suite 7818
Chicago, Illinois 60606
312/876-0500

Attorneys for Petitioner

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES	ii
INTRODUCTION STATEMENT	1
ARGUMENT	6
A. The Language Of Section 8 (b) (4) Encom- passes Coercive Secondary Conduct Not Pro- tected By The Publicity Proviso	6
B. The Legislative History Of Section 8 (b) (4) Demonstrates Congress' Intent To Encom- pass Coercive Secondary Conduct Not Pro- tected By The Publicity Proviso	8
C. Prohibiting Coercive Secondary Conduct Does Not Contravene The First Amendment	12
CONCLUSION	16

TABLE OF AUTHORITIES

Cases:	Page
<i>Associated General Contractors of California v. NLRB</i> , 514 F.2d 433 (9th Cir. 1975)	7
<i>Bozhorn's Big Muskego Gun Club v. Electrical Workers Local 494</i> , 798 F.2d 1016 (7th Cir. 1986)	4, 12
<i>Catalytic, Inc. v. Ocean County Building Trades Council</i> , 829 F.2d 430 (3d Cir. 1987)	4, 15
<i>Edward J. DeBartolo Corp. v. National Labor Relations Board ("DeBartolo I")</i> , 463 U.S. 147 (1983)	3, 5, 11
<i>Electrical Workers Local 761 v. NLRB</i> , 366 U.S. 667 (1961)	2
<i>Electrical Workers v. NLRB</i> , 341 U.S. 694 (1951)	6
<i>Giboney v. Empire Storage Co.</i> , 336 U.S. 490 (1949).	13, 14
<i>Honolulu Typographical Union No. 37 v. NLRB</i> , 401 F.2d 952 (D.C. Cir. 1968)	4
<i>Hospital and Service Employees Union, Local 399</i> , 263 NLRB 996 (1982)	11, 12
<i>Hospital & Service Employees Union Local 399 v. NLRB</i> , 743 F.2d 1417 (9th Cir. 1984)	4, 10, 11
<i>International Brotherhood of Electrical Workers, Local 501 v. NLRB</i> , 341 U.S. 694 (1950).	15
<i>International Longshoremen's Ass'n v. Allied International, Inc.</i> , 456 U.S. 212 (1982)	12, 13, 14, 15

	Page
<i>Joint Board of Culinary Workers v. NLRB</i> , 501 F.2d 794 (D.C. Cir. 1974)	2, 3
<i>Local 137, Sheet Metal Workers International Assn.</i> , 260 NLRB 1332 (1982)	2
<i>Local 1976, United Brotherhood of Carpenters and Joiners</i> , 357 U.S. 93 (1958)	2
<i>Local Union No. 25, Teamsters v. NLRB</i> , 831 F.2d 1149 (1st Cir. 1987)	4, 5, 6, 7
<i>Local Joint Board, Hotel and Restaurant Employees v. Sperry</i> , 323 F.2d 75 (8th Cir. 1963)	3
<i>Milk Drivers and Dairy Employees Local 357 ("Lohman Sales Co.")</i> , 132 NLRB 901 (1961)	7
<i>NAACP v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982)	1
<i>NLRB v. Denver Building and Construction Trades Council</i> , 341 U.S. 675 (1951)	11
<i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 575 (1969)	5, 13
<i>NLRB v. Local 3, International Brotherhood of Electrical Workers</i> , 317 F.2d 193 (2d Cir. 1963)	3
<i>NLRB v. Local 3, International Brotherhood of Electrical Workers</i> , 339 F.2d 600 (2d Cir. 1964)	3
<i>NLRB v. Retail Store Employees Union Local 1001 ("Safeco")</i> , 447 U.S. 607 (1964).	13
<i>NLRB v. Servette</i> , 377 U.S. 46 (1964)	5, 6, 7

<i>NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760 ("Tree Fruits")</i> , 377 U.S. 58 (1964)	7, 8, 9, 10
<i>NLRB v. Virginia Power Co.</i> , 463 U.S. 469 (1941)	5
<i>Sheet Metal Workers International Ass'n Local No. 48 v. Handy Corp.</i> , 332 F.2d 682 (5th Cir. 1964)	4
<i>Soft Drink Workers Union Local 812 v. NLRB</i> , 657 F.2d 1252 (D.C. Cir. 1980)	12
<i>Smitley v. NLRB</i> , 327 F.2d 351 (9th Cir. 1964)	3
<i>Solien v. Carpenters District Council of Greater St. Louis</i> , 623 F. Supp. 597, (E.D. Mo. 1985)	4
<i>Thornhill v. Alabama</i> , 310 U.S. 88 (1940)	14
<i>Wausau Steel Corp. v. NLRB</i> , 377 F.2d 369 (7th Cir. 1967)	13

CONSTITUTIONAL PROVISIONS AND STATUTES

First Amendment to the Constitution of the United States	<i>passim</i>
29 U.S.C. § 151 <i>et seq.</i> , National Labor Relations Act	<i>passim</i>
NLRB, LEGISLATIVE HISTORY OF THE LABOR MAGAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 (1959)	<i>passim</i>

MISCELLANEOUS

<i>Bush, Customers, Coercion and Congressional Intent: Regulating Secondary Consumer Boycotts Under the National Labor Relations Act</i> , 86 W. Va. L. Rev. 1127 (1984)	8, 9
C. Morris, THE DEVELOPING LABOR LAW, (2d Ed. 1971)	2, 3
Goldberg and Meiklejohn, <i>Title VII: Taft-Hartley Amendments, with Emphasis on the Legislative History</i> , 54 Nw. L. Rev. 747 (1960)	8, 9, 19

No. 86-1461

In The
Supreme Court of the United States
October Term, 1986

THE EDWARD J. DEBARTOLO CORPORATION,
Petitioner,

v.

FLORIDA GULF COAST BUILDING TRADES
COUNCIL, AFL-CIO,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

INTRODUCTORY STATEMENT

In striking the "delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife" (*NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982)), the National

Labor Relations Act compromises those competing interests. The Act neither bans all secondary activity nor sanctions all peaceful communication. Rather, it condemns only "specific union conduct directed to specific objectives."¹ The legislative "compromise" between "the uncontrolled power of management and labor to further their respective interests"² is reflected in the various choices available to, and concomitant limitations imposed upon, the Union concerning its wage dispute with High, the non-union contractor retained by Wilson's to construct its store at DeBartolo's East Lake Square Mall:

1. The Union could have picketed or coercively handbilled the primary employer, High. If, however, the Union's purpose was found to have been even partially motivated by a desire to obtain recognition as the bargaining agent of High's employees, then any picketing or threat of picketing—and even handbilling or other non-picketing conduct³—would have been precluded if it did not comport with Section 8(b)(7) of the Act.⁴ See, e.g., *Joint Board of Culinary Workers v. NLRB*, 501 F.2d 794, 798-800 (D.C. Cir. 1974); C. MORRIS, *supra* n. 3, at 1069-1101.

The Act's "compromise features" are further

¹ *Electrical Workers Local 761 v. NLRB*, 366 U.S. 667, 672-73 (1961).

² *Local 1976, United Brotherhood of Carpenters and Joiners*, 357 U.S. 93, 99-100 (1958).

³ See, e.g., *Local 137, Sheet Metal Workers International Assn.*, 260 NLRB 1332, 1337-38 (1982); C. MORRIS, *THE DEVELOPING LABOR LAW*, 1066-69 (2d Ed. 1971).

⁴ Those requirements are that, where the union is not certified as the bargaining agent, (a) the employer cannot have already lawfully recognized another union, (b) there cannot have been a valid election in the preceding year involving the same employees, and (c) the picketing cannot continue beyond "a reasonable time not to exceed thirty days" without a petition for an election having been filed under the Act.

evidenced by the informational proviso to Section 8(b)(7)(C), which, in language similar to the Section 8(b)(4) publicity proviso here at issue, creates a specific exception to the general prohibition of that subsection⁵ for "picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization" and then carves out an exception to that exception where, even though the picketing is "intended merely to . . . inform the general public . . . [,] it has the effect of inducing the employees of other employers to stop deliveries or other services to the targeted employer in order to coerce him into recognizing the union" (*Joint Board of Culinary Workers*, 501 F.2d at 800; emphasis the court's).⁶ This elaborate legislative scheme, notwithstanding that it forbids the communication of certain peaceful messages and, indeed, handbilling, has been consistently held not to violate the First Amendment.⁷

2. The Union also could have coercively handbilled or engaged in other non-picketing coercion directed at Wilson's, the "distributor" of the products "produced" by High, to communicate its message about High's alleged substandard wages. *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147, 156 (1983) ("DeBartolo I"). If, however, the Union did comply with the requirements of the Section 8(b)(4) publicity proviso, either because it (a) induced an

⁵ See *Smitley v. NLRB*, 327 F.2d 351 (9th Cir. 1964); *NLRB v. Local 3, International Brotherhood of Electrical Workers*, 317 F.2d 193 (2d Cir. 1963).

⁶ See C. MORRIS, *supra* n. 3, at 1101-1107.

⁷ *NLRB v. Local 3, International Brotherhood of Electrical Workers*, 339 F.2d 600 (2d Cir. 1964); *Local Joint Board, Hotel and Restaurant Employee v. Sperry*, 323 F.2d 75 (8th Cir. 1963).

unintended work stoppage,⁸ or (b) its message contained false or deceptive information⁹ or information unrelated to the primary dispute,¹⁰ or (c) it coerced, as here, a secondary employer who was not a distributor of the primary employer's products, then such conduct would violate the Act. Apart from the decision below, this carefully wrought legislative scheme, notwithstanding that the communication of certain peaceful messages has been precluded, has never heretofore been held to violate the First Amendment.¹¹

3. The Union, moreover, could have communicated by numerous other means its message with respect to High's alleged substandard wages as long as that communication neither "coerce[d], restrain[ed] or threaten[ed]" secondary employers who were not part of the producer-distributor chain. "Coerce," as demonstrated in *DeBartolo's* principal br., (pp. 14-15), is a "work of art" which covers "strike[s], picketing or other economic retaliation or pressure in a background of a labor dispute." *Sheet Metal Workers International Ass'n Local No. 48 v. Handy Corp.*, 332 F.2d 682, 686 (5th Cir. 1964); *Local Union No. 25, Teamsters v. NLRB*, 831 F.2d 1149, 1153 (1st Cir.

⁸ See, e.g., *Catalytic, Inc. v. Ocean County Building Trades Council*, 829 F.2d 430, 435 (3d Cir. 1987).

⁹ See, e.g., *Solien v. Carpenters District Council of Greater St. Louis*, 623 F. Supp. 597, 602-04 (E.D. Mo. 1985).

¹⁰ See, e.g., *Hospital & Service Employees Unions Local 399 v. NLRB*, 743 F.2d 1417, 1422-25 (9th Cir. 1984).

¹¹ First Amendment challenges were rejected in *Catalytic, Inc.*, 829 F.2d at 436-37, and *Solien*, 623 F. Supp. at 604. See also *Boxhorn's Big Muskego Gun Club v. Electrical Workers Local 494*, 798 F.2d 1016, 1021, 1024 (7th Cir. 1986). Other courts have assumed, without deciding the constitutional question, that coercive handbilling unprotected by the proviso may be prohibited. See, e.g., *Honolulu Typographical Union No. 37 v. NLRB*, 401 F.2d 952, 957-58 (D.C. Cir. 1968).

1987).¹²

Congress, in sum, has carefully balanced the interests of labor and management. That balance and the resulting government regulation is keyed to the coercive nature of the union's conduct, the union's objective, and the relational proximity of the targeted employer to the primary dispute. This legislative scheme has, in the nearly thirty years since the adoption of the 1959 amendments to the Act, been interpreted by this Court, the lower courts and, most significantly, by the Board, the expert tribunal entrusted by Congress to administer our national labor policy, to permit some, but not all coercive conduct, even if communication activity involving handbilling has been at issue. To accept the Union's position would emasculate this legislative scheme and nullify many of the decisions defining that scheme—including the opinions of this Court in *NLRB v. Servette*, 377 U.S. 46 (1964), and *DeBartolo I*. Only the means utilized by a union, and neither its coerciveness, objective, or the identity of the employer involved would, under the Union's approach, now be relevant. Handbilling or the use of other non-picketing methods would *always* be protected regardless of whether they induced a work stoppage, or falsely accused a secondary employer of paying substandard wages, or contained scurrilous information about an employer totally unrelated to the primary dispute, or imposed economic retaliation upon

¹² That same principle would equally apply to communications by any of the employers to their employees concerning the Union. As this Court stated many years ago, while an employer is free to "express[]... its view on labor policies or problems," if "the total activities of an employer restrain or coerce his employees... those employees are entitled to the protection of the Act. And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways." *NLRB v. Virginia Power Co.*, 463 U.S. 469, 477 (1941); see also *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-20 (1969).

a neutral business which had no relation whatsoever with that primary dispute. This attempt to radically revise federal labor law, as shown by DeBartolo's and the Board's principal briefs, finds no support in either the Act's language or its legislative history. Nor is it compelled by the First Amendment.

ARGUMENT

A. The Language Of Section 8(b)(4) Encompasses Coercive Secondary Conduct Not Protected By The Publicity Proviso

As discussed in DeBartolo's principal brief (pp. 10-13), Section 8(b)(4)(ii), in contrast to Section 8(b)(7), does not merely forbid picketing. It proscribes instead, in "broad and sweeping" (*Local Union No. 25, Teamsters*, 831 F.2d at 1153) language, all types of economic retaliation used against a secondary employer in furtherance of certain illegal objectives. A companion subsection, Section 8(b)(4)(i), contains an equally broad prohibition: "induc[ing] or encourag[ing]," terms which encompass "every form of influence and persuasion" (*Electrical Workers v. NLRB*, 341 U.S. 694, 701-02 (1951)) where used to cause the employees of the secondary employer to strike or withhold services in furtherance of those same objectives. Congress "careful[ly] create[d] . . . separate standards differentiating the treatment of appeals to the employees of the secondary employer not to perform their employment services, from appeals for other ends which are attended by threats, coercion or restraint. . . ." *Servette*, 377 U.S. at 54.

The choice of the terms "threaten, coerce or restrain" in subsection (ii), rather than "induce or encourage," does not suggest, as the Union argues (br., p. 2), that the legislative objective was to reach "only . . . direct threats . . . of labor trouble and picketing at the premises of such employers." If this narrow restriction was all that was intended, why did not Congress, as it did elsewhere, "ma[ke] its

meaning clear" and simply "bar picketing *per se*," *NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760*, 377 U.S. 58, 68 (1964) (emphasis added) ("*Tree Fruits*"). Why did Congress instead employ words which had been defined in other sections of the Act to include nonpicketing appeals to consumers, an interpretation which, as Secretary of Labor Mitchell testified, "[u]ndoubtedly . . . will be extended to those provisions of the proposed bill which use identical language" (Board's principal br., pp. 24-25) The answer is that, by utilizing the term "coercion," a word of art that had a recognized and established meaning (*see* DeBartolo's principal br., p. 11 and n. 6), Congress sought to exclude "mere requests" of the secondary employer for "voluntary cooperation" (*Servette*, 377 U.S. at 54 n. 12) that would be incorporated within the phrase "induce or encourage," but concurrently encompass "virtually 'any form of economic pressure of a compelling or restraining nature.'" *Local Union No. 25, Teamsters*, 831 F.2d at 1153, quoting *Associated General Contractors of California v. NLRB*, 514 F.2d 433, 438 (9th Cir. 1975). The reason for this distinction is evident: a union was entitled to make "oral appeals . . . directly to a secondary employer" to try "to persuade or ask him" to stop doing business with the primary employer (Union br., p. 12, citing *Milk Drivers and Dairy Employees Local 357 ("Lohman Sales Co.")*, 132 NLRB 901, 904 n. 5 (1961), and *Servette*, 377 U.S. at 54 n. 12), but, if this request failed, as it did here when the Union refused to limit the boycott to Wilson's and its suppliers and contractors (J.A. 25a, 87a-88a), the Union was not then free to widen industrial strife and injure other neutral employers by exerting coercive pressure, apart from that sanctioned by the proviso, to force them to agree to the Union's position.

B. The Legislative History Of Section 8(b)(4) Demonstrates Congress' Intent To Encompass Coercive Secondary Conduct Not Protected By The Publicity Proviso

The Union does not dispute that there was a conflict between the Senate Kennedy-Ervin bill which did not contain any provisions on secondary boycotts and the House Landrum-Griffin bill,¹³ which, as stated by several eminent contemporary union analysts, "contained broad provisions . . . which virtually banned all secondary activity in aid of a union involved in a labor dispute, including informational picketing and appeals to consumers not to patronize goods produced under substandard or non-union conditions."¹⁴ See, to the same effect, Bush, *Customers, Coercion and Congressional Intent: Regulating Secondary Consumer Boycotts Under the National Labor Relations Act*, 86 W. Va. L. Rev. 1127, 1137 (1984) ("Supporters and opponents alike understood that this [House] language was intended to prohibit, *inter alia*, consumer boycotts of secondary employers.").¹⁵ This conflict was resolved

¹³ The Union (br., p. 21) mistakenly contends that the Landrum-Griffin bill only reached "consumer picketing." But, as the Union itself acknowledges, Representative Griffin, in articulating the "rationale for the 'threaten, restrain, or coerce' language" (Union br., p. 20), intended to make "threaten[ing] the secondary employer, himself, with a strike or *other economic retaliation* . . . unlawful by the insertion of a clause 4(ii). . . ." 2 Leg. Hist. at 1523 (emphasis added). The Union also acknowledges (br., p. 20, n. 10) that "threaten[ing] him [the neutral employer] with labor trouble or *other consequences*" was a "loophole" (2 Leg. Hist. at 1568 Rep. Griffin) the Landrum-Griffin bill was intended to close.

¹⁴ Goldberg and Meiklejohn, *Title VII: Taft-Hartley Amendments, with Emphasis on the Legislative History*, 54 Nw. L. Rev. 747, 765 (1960).

¹⁵ See also, the joint analysis (2 Leg. Hist. at 1708) of the Senate and House bills issued by Senator Kennedy and Congressman Thompson discussed in *Tree Fruits*, 377 U.S. at 69 ("The

(Footnote continued on the following page)

in conference by a compromise publicity proviso which was agreed upon as an "exception" to "the substance of the House-passed Landrum-Griffin provisions on boycott and picketing [which were] . . . retained by the conference committee."¹⁶

Both Senator Kennedy and Congressman Thompson, when they subsequently explained the conference agreement to their colleagues, referred exclusively to non-picketing consumer appeals directed at a company that met the producer-distributor requirement, *i.e.*, another concern which sold the goods of the primary employer. See Board's br., (pp. 28-30), citing 2 Leg. Hist. at 1432, 1720. This was, of course, the express restriction contained in the proviso which was ultimately enacted. From this compromise the Union argues that the producer-distributor limitation—indeed, the entire publicity proviso—is merely an idle collection of words which has no practical effect.¹⁷ It

¹⁶ (Continued)

prohibition [of the House bill] reaches not only picketing but leaflets, radio broadcasts and advertisements") and the similar statements which Senator Kennedy and Congressman Thompson made with respect to the Landrum-Griffin bill when they subsequently explained to their respective chambers the conference committee's agreement (2 Leg. Hist. at 1432, 1720). There is no basis for now contending, nor did *Tree Fruits* so indicate, that, as the Union argues (br., p. 31), these statements all reflect an inaccurate characterization of the House bill.

¹⁶ Goldberg and Meiklejohn, 54 Nw. L. Rev. at 766; see also Bush, 86 W. Va. L. Rev. at 1138.

¹⁷ Union br., (pp. 28-30). The Union argues that, like the primary picketing proviso to Section 8(b)(4), the publicity proviso should not be construed as a "substantive proviso" but, rather, only as a "clarification" which "adds nothing to the law." There are two fallacies to this contention. First, the primary picketing proviso does have specific substantive purposes: it both "eliminat[ed] any question whether employees of another employer may lawfully refuse to cross a picket line in a primary strike" by "specifically [providing]

(Footnote continued on the following page)

relies on two fragments of the legislative history; a cursory statement contained in the Summary Analysis of Conference Agreement (2 Leg. Hist. at 1712-13), which was a "preliminary report . . . [which was] not designed to explain the bill in every detail. . . ." (2 Leg. Hist. at 1712), and Senator Kennedy's comment, as part of his explanation of the conference agreement, that unions were left free to "carry on all publicity short of having ambulatory picketing in front of a secondary site." (2 Leg. Hist. at 1432). The former, as has already been demonstrated (DeBartolo's principal br., p. 23 n. 18; Board's br., pp. 31-32), cannot be utilized as a source for either a correct or certainly a complete definition of the scope and limitations set forth in the publicity proviso. Reliance on Senator Kennedy's "single statement" (*Tree Fruits*, 377 U.S. at 58) is also misplaced. That remark is simply too ambiguous—since the reference to "all publicity" may have been either to the means of publicity or to the content of such publicity—"to make any conclusive interpretations of the publicity proviso." *Hospital and Service Employees Union, Local 399*, 743 F.2d at 1423.

Moreover, since Senator Kennedy "does not mention

17 (Continued)

that they may lawfully do so," and, "[p]ossibly of even greater significance . . . [.] by guaranteeing the right of a union to engage in primary picketing and primary strikes Congress would appear to have effectively pre-empted this field for the first time." Goldberg and Meiklejohn, 54 Nw. L. Rev. at 768; see also Senator Kennedy's statements in his presentation of the conference report (2 Leg. Hist. at 1431-32). Second, if the publicity proviso was intended only to "offer[] express sanctuary for communications that in any event would not violate subsection (ii)" (Union br., pp. 29-30), Congress could have easily done so by simply utilizing words such as "nothing in Section 8(b)(4) shall be construed to prohibit publicity other than picketing." It surely did not need to provide for the elaborate set of limitations contained in the proviso clause, language which, under the Union's view, is rendered superfluous. Congress did not legislate idly; it intended each provision of the proviso to have significance and effect.

any restriction on the nonpicketing publicity of a union at a secondary site [and] . . . the proviso plainly does impose some restrictions, Senator Kennedy's statement cannot reasonably be read as support for refusing to give effect to one of those restrictions, while giving effect to the others."¹⁸ In other words, if the Union was not entitled here to engage in nonpicketing publicity which was not truthful or which induced a work stoppage, even though these restrictions were not mentioned by Senator Kennedy, it was similarly not free to otherwise engage in "all publicity" without regard to the producer-distributor limitation. Senator Kennedy's comment, in sum, "does not . . . stand alone. It stands with the language of the proviso itself, which plainly does not permit unions to carry on 'all publicity.'"¹⁹ Congress restricted a union's right to impose a consumer boycott to those secondary employers who had a producer-distributor relationship to the primary dispute and who, unlike DeBartolo and the other Mall tenants here (*J.A. 27a*), had the ability to affect High, the source of the Union's primary dispute. It is for that compelling reason—the "concern that motivates all of § 8(b)(4): 'shielding unoffending employers and others from pressures in controversies not their own'"²⁰—that Congress specifically

¹⁸ *Hospital and Service Employees Union, Local 399*, 263 NLRB 996, 1003 (1982), remanded, 743 F.2d 1417 (9th Cir. 1984) (Member Jenkins, concurring in part and dissenting in part; emphasis Member Jenkins'). See also *id.* at 998 n. 9 ("We agree with Member Jenkins' . . . discussion of the legislative history of the proviso . . .") and 1006 (Member Zimmerman, concurring in part and dissenting in part) ("Senator Kennedy's statements of legislative intent . . . demonstrate that those restrictions [of the proviso] are to be confined to those expressly set out in the language of the proviso.")

¹⁹ *Id.* at 1002 (Member Jenkins, concurring in part and dissenting in part).

²⁰ *DeBartolo I*, 463 U.S. at 155-56, quoting *NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675, 692 (1951).

prohibited coercive conduct regardless of its means and regardless of whether it involved handbilling.

C. Prohibiting Coercive Secondary Conduct Does Not Contravene The First Amendment

1. The Union obfuscates the constitutional issue by positing several false premises. It is not correct that the question in this case is "whether the government may ban a message entirely because of its content, however that message is phrased and however conveyed." Union br., (p. 32-33), (emphasis the Union's). As already shown (see pages 2-6, *supra*), the Union, as in *International Longshoremen's Ass'n v. Allied International, Inc.*, 456 U.S. 212, 226 (1982), had "many ways in which . . . [it could] express . . . [its] opposition to [High's alleged substandard wages] . . . without infringing upon the rights of others."

The Union, moreover, did not phrase its message to only communicate information or advise the public about High. Instead, the Union advocated economic action against DeBartolo and the Mall tenants. It may even be true that, in certain contexts, the Union could have phrased its message in "do not buy" terms and still not have been coercive where either there would only have been a trivial impact on the neutral's business or where the communication would not significantly expand the scope of the primary dispute.²¹ That question need not be addressed here, however, since "the nature and foreseeable consequences of the pressure which the [U]nion actually placed"²² on DeBartolo and the Mall tenants through its extensive and repeated on-the-spot handbilling could

²¹ See *Hospital and Service Employees Union, Local 399*, 263 NLRB at 1003-1005 (Member Jenkins, concurring in part and dissenting in part). Cf. *id.* at 999 n. 14. See also *Boxhorn's Big Muskego Gun Club* 798 F.2d at 1019-21; *Soft Drink Workers Union Local 812 v. NLRB*, 657 F.2d 1252, 1267 (D.C. Cir. 1980).

²² *Soft Drink Workers Union Local 812*, 657 F.2d at 1263.

"reasonably [be] . . . expected,"²³ as the Board concluded, to inflict substantial "economic harm" on those employers "by causing them to lose business" (Pet. App A, p. 42a n. 6). See DeBartolo's principal br., (pp. 14-15)²⁴.

2. The Union also mistakenly asserts that in the instant case, unlike *Giboney v. Empire Storage Co.*, 336 U.S. 490 (1949), and *Allied International*, 456 U.S. 212 (1982), the object of its activity was not unlawful. Union br., (pp. 33-35 and p. 34 n. 21). This contention was, however, rejected in *Allied* where, in similar circumstances, this Court noted that the illegal objective consists of forcing a neutral employer to cease doing business with another person. 456 U.S. at 222. Since that was admittedly the Union's objective here (Pet. App. A, p. 15a n. 8), it does not matter that the Union's motive may have been "understandable and even commendable" or that, as the Union apparently believes, it somehow engaged in a "good secondary boycott." *Id.* at 223 and 225 n. 23.

The claim (Union br., pp. 34-35 and n. 23) that the Union here could not exert the compulsion that existed in *Giboney* and *Allied International* to impose sanctions on

²³ *NLRB v. Retail Store Employees Union Local 1001 ("Safeco")*, 447 U.S. 607, 614 (1964).

²⁴ The Union argues (br., p. 35 n. 23) that a distinction between a communication which permissibly communicates the facts of a labor dispute and that which impermissibly coerces a secondary employer is "impossible to draw without seriously impeding the ability to engage in even the most abstract or fact-oriented speech. . . ." That argument is specious. Such a distinction is no different than that which the Board must frequently make in numerous other areas entrusted to its expertise. As this Court stated in rejecting the same First Amendment contention in one of those other areas—drawing "the line between so-called permitted predictions and proscribed threats" — a union "can easily make [its] . . . views known without engaging in 'brinksmanship' when it becomes all too easy to 'overstep and tumble [over] the brink.'" *Gissel Packing*, 395 U.S. at 620, quoting *Wausau Steel Corp. v. NLRB*, 377 F.2d 369, 372 (7th Cir. 1967).

its members, or that only labor unions are subject to the restraints imposed by the Act, is also immaterial. The Union could clearly take action against its members who defied the boycott and shopped at the Mall. In any event, the critical distinction is that, in contrast to the boycotts that conceivably could be waged by other groups (Union br., p. 35 n. 23), there is a recognizable difference when a national labor union, or, as in this case, a number of such unions, "has chosen to marshall against neutral parties the considerable powers derived by its locals and itself under the federal labor laws. . . ." *Allied International*, 456 U.S. at 225. It has long been settled that the "legislative power to regulate trade and commerce includes the power to determine what group, if any, shall be regulated, and whether certain regulations will help or injure businessmen, workers, and the public in general. . . . [The] state [may] 'set the limits of permissible contest open to industrial combatants.'" *Giboney*, 336 U.S. at 497-99, quoting *Thornhill v. Alabama*, 310 U.S. 88, 103-104 (1940). Those same principles apply here to permit Congress' regulation of the scope of industrial strife and union conduct.

The critical teaching of *Giboney* and *Allied International* which the Union ignores is that, regardless of whether the means used is "initiated, evidenced or carried out by means of language, either spoken, written, or printed" (*Giboney*, 336 U.S. at 502), where those methods are utilized, as here, "not to communicate but to coerce" (*Allied International*, 456 U.S. at 226), no abridgment of First Amendment rights occurs. Here, as in *Giboney*, 336 U.S. at 490, the Union was "doing more than exercising a right of free speech . . . [it was] exercising [its] . . . economic power together with that of [its] . . . allies to compel [DeBartolo and the Mall tenants] . . . to abide by union . . . regulation. . . ." Just as Missouri had the constitutional authority in *Giboney* to enforce its antitrust laws to regulate such conduct, Congress has the constitutional authority to preclude this "heavy burden on

neutral employers" and expansion of "the area of industrial conflict" (*Allied International*, 456 U.S. at 223 and n. 20).

3. If the Union had utilized peaceful picketing or even handbilled to induce a work stoppage in violation of Section 8(b)(4)(i) (Union br., p. 41 n. 26; see also *Catalytic, Inc.*, 829 F.2d at 436-37) as the means to effectuate a secondary consumer boycott, the Union concedes that such conduct could be constitutionally enjoined notwithstanding that it constituted a "prior restraint . . . punish[ment for] the publication of truthful information urging lawful action . . . [or] censorship of speech on the basis of content, viewpoint, or the identity of the speaker. . . ." (Union br., p. 3.) The Union's argument is reduced, therefore, to a contention that coercive handbilling is so "qualitatively different" (Union br., p. 40) from those other tactics as to require a different result under the First Amendment. In its principal brief, DeBartolo demonstrated that, since picketing does not even require patrolling or anything more than the mere presence of a union representative at an employer's business to publicize a union message (DeBartolo's principal br., pp. 16-17 and n. 10; cf. Union br., pp. 32-33 n. 19), handbilling could conceivably cause more loss to DeBartolo and the Mall tenants than picketing. DeBartolo also showed that a variety of other coercive union tactics, apart from picketing, have been found to be unlawful notwithstanding the First Amendment. See DeBartolo's principal br., (pp. 26-28). The Union continues to argue (br., p. 38), however, that because picketing is *normally* more effective than handbilling and *normally* involves "more compulsive features," picketing imposes a unique form of secondary economic pressure. The prior decisions of this Court and the lower courts holding that the imposition of unlawful secondary pressure, notwithstanding the means used, "carries no unconstitutional abridgment of free speech,"²⁵ are,

²⁵ *International Brotherhood of Electrical Workers, Local 501 v. NLRB*, 341 U.S. 694, 705 (1950).

under the Union's view, to be viewed simply as "picketing cases" (Union br., p. 40). There is no basis, for the reasons set forth in DeBartolo's and the Board's principal briefs, to circumscribe the constitutional right of Congress to prohibit the substantive evils condemned by Section 8(b)(4).

CONCLUSION

For all of the foregoing reasons, as well as the reasons contained in DeBartolo's and the Board's principal briefs, it is respectfully requested that the judgment of the court of appeals be reversed and that this case be remanded to that court with instructions to deny the Union's petition for review and to enforce the Board's order.

Respectfully submitted,

LAWRENCE M. COHEN

MARTIN K. DENIS

FOX AND GROVE, CHARTERED
233 South Wacker Drive
Sears Tower-Suite 7818
Chicago, Illinois 60606
312/876-0500

Attorneys for Petitioner

REPLY BRIEF

16
No. 86-1461

Supreme Court, U.S.
FILED
JAN 7 1988

JOSEPH F. SPARKS, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1987

EDWARD J. DEBARTOLO CORP., PETITIONER

v.

FLORIDA GULF COAST BUILDING AND CONSTRUCTION TRADES
COUNCIL AND NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD
AS RESPONDENT SUPPORTING PETITIONER

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel
National Labor Relations Board
Washington, D.C. 20570

TABLE OF AUTHORITIES

	Page
Cases:	
<i>Babbitt v. Farm Workers</i> , 442 U.S. 289 (1979)	10, 11
<i>Bolger v. Youngs Drug Products Corp.</i> , 463 U.S. 60 (1983)	8, 12, 14
<i>Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n</i> , 447 U.S. 557 (1980)	12
<i>Connick v. Myers</i> , 461 U.S. 138 (1983)	11, 14
<i>Consolidated Edison Co. v. Public Service Comm'n</i> , 447 U.S. 530 (1980)	12
<i>Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.</i> , 472 U.S. 749 (1985)	11, 12
<i>Edward J. DeBartolo Corp. v. NLRB</i> , 463 U.S. 147 (1983)	2, 4, 5
<i>Electrical Workers v. NLRB</i> , 341 U.S. 694 (1951)	2, 4
<i>FCC v. Pacifica Foundation</i> , 438 U.S. 726 (1978)	11
<i>First National Bank v. Bellotti</i> , 435 U.S. 765 (1978)	12
<i>Int'l Ass'n of Machinists, Lodge 942 (Alloy Mfg. Co.)</i> , 119 N.L.R.B. 307 (1957) enforcement denied, 263 F.2d 796 (9th Cir. 1959)	6
<i>Lenox Shoe Co.</i> , 4 N.L.R.B. 372 (1937)	6
<i>Local 662, Radio & Television Engineers (Middle South Broadcasting)</i> , 133 N.L.R.B. 1698 (1961)	3
<i>Longshoremen's Ass'n v. Allied Int'l, Inc.</i> , 456 U.S. 212 (1982)	14
<i>NAACP v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982)	14
<i>NLRB v. American Furnace Co.</i> , 158 F.2d 376 (7th Cir. 1946)	6
<i>NLRB v. Catholic Bishop</i> , 440 U.S. 490 (1979)	2
<i>NLRB v. Denver Building & Construction Trades Council</i> , 341 U.S. 675 (1951)	2, 5
<i>NLRB v. Food & Commercial Workers</i> , No. 86-594 (Dec. 14, 1987)	1
<i>NLRB v. Fruit & Vegetable Packers, Local 760</i> , 377 U.S. 58 (1964)	2, 3, 8, 9
<i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 575 (1969)	2, 14
<i>NLRB v. O'Sullivan Rubber Corp.</i> , 269 F.2d 694 (4th Cir. 1959), rev'd, 363 U.S. 329 (1960)	6

IV

Cases—Continued	Page
<i>NLRB v. Port Gibson Veneer & Box Co.</i> , 167 F.2d 144 (5th Cir. 1948)	6
<i>NLRB v. Retail Store Employees Union, Local 1001</i> , 447 U.S. 607 (1980)	2, 3, 4, 8, 9, 10, 13
<i>NLRB v. Servette, Inc.</i> , 377 U.S. 46 (1964)	2, 5
<i>NLRB v. Virginia Electric & Power Co.</i> , 314 U.S. 469 (1941)	13
<i>Ohrulik v. Ohio State Bar Ass'n</i> , 436 U.S. 447 (1978)	11
<i>Organization for a Better Austin v. Keefe</i> , 402 U.S. 415 (1971)	15
<i>Pattern Makers v. NLRB</i> , 473 U.S. 95 (1985)	1-2
<i>Police Dep't v. Mosley</i> , 408 U.S. 92 (1972)	9
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984)	12
<i>San Francisco Arts & Athletics, Inc. v. United States Olympic Committee</i> , No. 86-270 (June 25, 1987)	12, 13-14
<i>Thomas v. Collins</i> , 323 U.S. 516 (1945)	13
<i>Thornhill v. Alabama</i> , 310 U.S. 88 (1940)	13
<i>Virginia Pharmacy Bd. v. Virginia Consumer Council</i> , 425 U.S. 748 (1976)	2, 8, 12, 14, 15
<i>Young v. American Mini Theatres</i> , 427 U.S. 50 (1976)	15
<i>Zauderer v. Office of Disciplinary Counsel</i> , 471 U.S. 626 (1985)	8

Constitution and statutes:

U.S. Const. Amend. I (Speech Clause)	2, 3, 7, 10, 11, 12, 13, 14
--	-----------------------------

National Labor Relations Act, 29 U.S.C. (& Supp. III)

151 et seq.:

§ 8(a)(1), 29 U.S.C. 158(a)(1)	6
§ 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A)	6
§ 8(b)(4)(i), 29 U.S.C. 158(b)(4)(i)	4
§ 8(b)(i)(B), 29 U.S.C. 158(b)(4)(i)(B)	2
§ 8(b)(4)(ii), 29 U.S.C. 158(b)(4)(ii)	4
§ 8(b)(4)(ii)(B), 29 U.S.C. 158(b)(4)(ii)(B)	1, 2, 3, 7, 8, 10, 12, 13, 15

Miscellaneous:

105 Cong. Rec. (1959): p. 14347	6
--	---

V

Miscellaneous—Continued	Page
pp. 17878-17899	7
pp. 18133-18134	7
Cox, <i>Strikes, Picketing and the Constitution</i> , 4 Vand. L. Rev. 574 (1951)	9
Cox, <i>The Supreme Court 1979 Term—Foreward: Freedom of Expression in the Burger Court</i> , 94 Harv. L. Rev. 1 (1980)	9, 10, 12, 13
II NLRB, <i>Legislative History of the Labor-Management Reporting and Disclosure Act of 1959</i> (1959)	6, 7

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1461

EDWARD J. DEBARTOLO CORP., PETITIONER

v.

FLORIDA GULF COAST BUILDING AND CONSTRUCTION TRADES
COUNCIL AND NATIONAL LABOR RELATIONS BOARD

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

**REPLY BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD
AS RESPONDENT SUPPORTING PETITIONER**

The "speech" at issue in this case is the words "PLEASE DON'T SHOP AT EAST LAKE SQUARE MALL" and other words of the same tenor that appeared on respondent union's handbills. We demonstrated in our opening brief (at 15-33) that such a call for a total consumer boycott of neutral businesses may "threaten, coerce, or restrain" those businesses within the meaning of Section 8(b)(4)(ii)(B), 29 U.S.C. 158(b)(4)(ii)(B), whether the words appear on picket signs or handbills. We also demonstrated (at 33-46) that the narrowly drawn prohibition of such coercion of neutrals is consistent with the First Amendment. The respondent union does not answer our arguments on either the statutory or the constitutional point.

1. Preliminarily, we note that the union wholly ignores the fact that the Board has, since enactment of Section 8(b)(4)(ii)(B) in 1959, consistently construed the statutory phrase "threaten, coerce, or restrain," to reach handbilling that calls for a total boycott of a neutral business (see Gov't Br. 18-21). This Court traditionally accords broad deference to the Board's interpretation of the Act,¹ and it is the very heart of the Board's statutory

¹ See generally *NLRB v. Food & Commercial Workers*, No. 86-594 (Dec. 14, 1987), slip op. 10; see also *Pattern Makers v. NLRB*, 473 U.S. 95, 117

assignment to interpret statutory limitations on union (and management) expression. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-620 (1969); *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 778 n.3 (1976) (Stewart, J., concurring). Accordingly, the Court has held that, while the Board is not the ultimate authority on what statutory prohibitions the Speech Clause permits, its view on what expression the statute purports to prohibit is, if permitted by the text and legislative history, dispositive. See *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 691-692 (1951) (deference given to Board construction of Section 8(b)(4)(i)(B) notwithstanding First Amendment challenge); *Electrical Workers v. NLRB*, 341 U.S. 694, 705 (1951) (same).²

(1985) (White, J., concurring) (deference is required for any "sensible construction" of the statutory language that "is not negated by the legislative history of the Act").

As respondent union notes (Br. 9 n.3), the Court has refused to defer to the Board's construction of Section 8(b)(4)(ii)(B) in cases where it concluded that the Board's interpretation was inconsistent with either the language or legislative history of the statute. See *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147, 157 & n.10 (1983) (*DeBartolo I*); *NLRB v. Servette, Inc.*, 377 U.S. 46, 50 n.4 (1964); *NLRB v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58, 62-72 (1964) (*Tree Fruits*). Where the Board's interpretation of Section 8(b)(4)(ii)(B) has been reconcilable with the language and legislative history of the statute, however, the Court has affirmed the construction of the Board. See *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 611-615 (1980).

² The appropriateness of deference to the Board in this case is not diminished by the statement in *NLRB v. Catholic Bishop*, 440 U.S. 490, 501 (1979), repeatedly cited by the union (Br. 2, 4-5, 25), that only the "affirmative intention of Congress clearly expressed" would warrant interpreting the Act to give the Board jurisdiction in an area where its exercise would give rise to serious constitutional questions. It could hardly be clearer that Congress gave the Board jurisdiction to determine that various kinds of statements during labor disputes constitute unfair labor practices. The question whether the statute bars the statement "PLEASE DON'T SHOP * * *," included in a handbill in the circumstances of this case, is the kind of question the Board faces repeatedly, and on which its views are plainly entitled to great weight.

The union also suggests (Br. 9 n.3) that deference to the Board is inappropriate because of the Board's failure to pass in this case on the constitutional challenge to Section 8(b)(4)(ii)(B) as construed. But the Board's willingness to assume that the Act is constitutional is not a reason for not defer-

2. In any event, as explained in our opening brief (at 15-18, 21-33), the language and legislative history of Section 8(b)(4)(ii)(B) flatly refute the union's argument that the section does not apply to a call for a total boycott of neutral businesses where the call is contained in a peacefully distributed handbill.

a. The respondent union first tries to find textual support for its argument by suggesting (Br. 9-13) that the phrase "threaten, coerce, or restrain" itself draws a distinction between reasoned persuasion and more intimidating activity. This suggestion confuses the issue. The direct object of the verbs "threaten" and "coerce" is not consumers to whom handbills are given but "person[s] engaged in * * * an industry affecting commerce," i.e., neutral businesses. Neutral businesses are quite capable of being "threatened" and "coerced" by a calm and reasoned appeal to their customers to put them out of business. No member of this Court has ever expressed any doubt that efforts by a union to persuade consumers to engage in a total boycott of a neutral employer "coerce" that employer. See, e.g., *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 613, 615-616 (1980) (*Safeco*); *id.* at 620 (Brennan, J., dissenting); *NLRB v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58, 72 (1964) (*Tree Fruits*). Nor has any member of the Court ever suggested that, in order to contravene Section 8(b)(4)(ii)(B), the union's communicative activity must be coercive in the additional sense that it tends to force, rather than persuade, consumers to join the boycott. A union's communicative activity is "coercive" of the neutral employer when it threatens that employer with a loss of all patronage of those customers who choose to respond to the appeal; in such circumstances, it is reasonable for the neutral employer to con-

ring to the Board's expertise on the logically prior statutory construction question. On matters of statutory interpretation, the constitutional shadow does not wholly displace textual and historical substance. In any event, as explained in our opening brief (at 18-19 n.13, 25-26, discussing *Local 662, Radio & Television Engineers (Middle South Broadcasting)*, 133 N.L.R.B. 1698, 1715 (1961)), the Board concluded shortly after enactment that Congress resolved any First Amendment doubts in favor of statutory coverage except to the extent publicity is privileged by the proviso.

clude that failure to help the union in its labor dispute with the primary employer will cause the neutral to suffer "ruin or substantial loss" (*Safeco*, 447 U.S. at 613, 615-616 n. 11; see also *id.* at 620 (Brennan, J., dissenting)).³

The union offers no real response to the most dispositive evidence in the statutory text: the language of the publicity proviso. As this Court said in *DeBartolo I*, 463 U.S. at 156, "if Congress had intended all peaceful, truthful handbilling that informs the public of a primary dispute to fall within the proviso [and hence be permissible], the statute would not have contained a distribution requirement." The union seeks to characterize the publicity proviso (Br. 26, 28-30) as a "clarification" by Congress that nonpicketing publicity is permissible, but a proviso that expressly shields nonpicketing publicity under three specified conditions simply cannot be read as a "clarification" that nonpicketing publicity is permissible under *any* conditions.⁴ To do so would treat Congress as having labored to draft lengthy conditions that have no operative significance in any case whatever, and this Court as having unanimously proceeded

³ There is no merit to respondent union's contention (Br. 10, 30) that, in order for Section 8(b)(4)(i) to have meaning, Section 8(b)(4)(ii) must be restricted to communications that go beyond mere appeals to consumers' reason. Subparagraph (i) makes it an unfair labor practice to "induce or encourage" any employee of a neutral to strike for a prohibited secondary objective. Subparagraph (ii) makes it an unfair labor practice to "threaten or coerce" the neutral itself. As explained in our opening brief (at 43), this means that a union may "induce or encourage[]" secondary employers to stop doing business with a primary employer (by, for example, appealing to them directly), so long as it does not threaten the neutral with "loss or substantial ruin" (see *Safeco*, 447 U.S. at 613, 615-616 n.11); by contrast, Section 8(b)(4)(i) is implicated by "every form of influence and persuasion" (*Electrical Workers v. NLRB*, 341 U.S. at 701-702).

⁴ These three qualifying conditions thus distinguish the publicity proviso from the other provisos, such as the primary activity proviso, discussed in the respondent union's brief (at 28-30). The other provisos do not contain words of limitation like those the publicity proviso contains; thus, the former, but not the latter, may properly be treated as an explanation of the scope of, rather than an exception to, the statutory provisions to which they are attached.

on a wholly false premise—and as having wasted its time—in *DeBartolo I*.⁵

The union attacks the publicity proviso (and the obvious inference that Congress *did* mean to make it an unfair labor practice to engage in coercive secondary nonpicketing activity that does *not* meet the three conditions) by suggesting (Br. 27) that it is implausible that Congress in 1959 found appeals for boycotts of secondary businesses outside the chain of distribution to be more objectionable than appeals for boycotts of secondary businesses within the chain of distribution. But in fact it is quite understandable that Congress, in reaching a compromise concerning the degree to which it would "shield[] unoffending employers and others from pressures in controversies not their own" (*DeBartolo I*, quoting *Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951)), would treat secondary employers outside the chain of distribution differently from secondary employers in the chain of distribution: where there is a producer/distributor relationship between the primary employer and the secondary employer, the latter can simply stop carrying the former's product and thereby escape the union's pressure. Where no producer/distributor relationship exists, the secondary employer is a truly helpless neutral, which can help itself only by entering into the primary employment dispute.⁶

b. Respondent union's legislative history argument (Br. 13-31) fares no better. As we explained in our opening brief (at 24-33), the legislative history shows that (1) the Administration

⁵ It is a telling sign that, in a fifty-page brief, twenty-seven pages of which are devoted to the statutory issue, the respondent union cites this Court's decision in *DeBartolo I* only twice (see Br. 4, 9), and at no point deals with the holding of that decision, to wit, that the publicity proviso must not be interpreted so as to deprive the distribution requirement of "substantial practical effect" (463 U.S. at 157 n. 10).

⁶ The ACLU (Br. 13 n.3) rips from its context the Court's statement in *NLRB v. Servette, Inc.*, 377 U.S. 46, 55 (1964), that nothing in the legislative history "suggests that the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception" The Court's point was that, just as Section 8(b)(4) covers cases where the primary employer is not a manufacturer or processor, so does the proviso; the Court was not saying that the three conditions set forth in the proviso are without meaning. See *DeBartolo I*, 463 U.S. at 155.

proposed the statutory prohibition on the understanding that the prior interpretations of the words "coerce" and "restrain" in Sections 8(a)(1) and 8(b)(1)(A) of the statute would inform the interpretation of the phrase "threaten, coerce, or restrain" in Section 8(b)(4)(ii)(B); (2) Sections 8(a)(1) and 8(b)(1)(A) had previously been applied to indirect economic pressure of the kind at issue here;⁷ (3) although the Administration's proposal was initially rejected by the Senate, it was accepted by the House, where Congressman Griffin introduced it by stating that it would protect a secondary employer from union threats of "a strike or *other economic retaliation*" (105 Cong. Rec. 14347 (1959); II NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 1523 (1959) (emphasis added) [hereinafter *Leg. Hist.*]); (4) Senator Kennedy, the chairman of the conference committee, and Congressman Thompson, a house conferee, explained to colleagues in their respective chambers that the phrase "threaten, coerce, or restrain" would apply to consumer appeals carried out through handbilling, newspaper advertisements, and radio broadcasts, as well as picketing; (5) members of the conference committee deadlocked over this broad ban on union publicity; (6) to break the deadlock, Senator Kennedy proposed a compromise, reflected in the publicity proviso, under which non-picketing consumer appeals would be exempted from the

⁷ The respondent union errs in suggesting (Br. 14-15, 16 n. 7) that the Administration thought that only direct coercion would be prohibited by the proposed amendment. While the examples the Administration cited involved direct coercion, it was clear at the time that certain forms of indirect pressure by employers and unions were "coercive" within the meaning of Sections 8(a)(1) and 8(b)(1)(A). See, e.g., *Int'l Ass'n of Machinists, Lodge 942 (Alloy Mfg. Co.)*, 119 N.L.R.B. 307 (1957), enforcement denied in pertinent part, 263 F.2d 796 (9th Cir. 1959) (indirect economic pressure on employer by union); *NLRB v. O'Sullivan Rubber Corp.*, 269 F.2d 694 (4th Cir. 1959), rev'd on other grounds, 363 U.S. 329 (1960) (same); *NLRB v. American Furnace Co.*, 158 F.2d 376, 379 (7th Cir. 1946) (speech by town mayor at the workshop reciting adverse consequences of unionization constitutes coercion by employer); *NLRB v. Port Gibson Veneer & Box Co.*, 167 F.2d 144, 146 (5th Cir. 1948) (surveillance by local sheriff constitutes coercion by employer); *Lenox Shoe Co.*, 4 N.L.R.B. 372, 378, 381 (1937) (employer request to members of the Chamber of Commerce to pressure its employees to join a particular union, by, inter alia, refusing to extend credit to those who did not join, is coercive).

statutory proscription, but only under certain specified conditions, including the condition that there be a producer/distributor relationship between the primary and secondary employers; and (7) both the conference committee and the two chambers of Congress adopted Section 8(b)(4)(ii)(B) and its publicity proviso on this understanding. The suggestion that Section 8(b)(4)(ii)(B) was not understood to reach any handbilling or other nonpicketing publicity directed at a neutral business is irreconcilable with this legislative history.

The union's only real response (Br. 30-31) is that Senator Kennedy and Congressman Thompson spoke authoritatively with respect to the effect of the proviso, "because they were proponents of the conference report," but without authority in describing the reach of the statutory proscription, because they were merely "endorsing characterizations made by the bill's opponents during the House debate." But Senator Kennedy and Congressman Thompson were not just the architects of the publicity proviso: they were the framers of the compromise between those in Congress who favored a broad ban on non-picketing publicity and those in Congress who favored no ban on such activity at all.⁸ Their views are authoritative not only as to the meaning of the publicity proviso, but also as to the scope of the problem which the compromise sought to address.

3. The respondent union next contends (Br. 31-38) that construing Section 8(b)(4)(ii)(B) to ban this call for a consumer boycott of neutral businesses would violate the First Amendment,

⁸ In addition to the legislative history to which we pointed in our opening brief (at 28-32), we note that, after the conference committee agreed upon Senator Kennedy's suggestion, Senator Kennedy informed the Senate that, "[t]his bill is a compromise"; that "no one is fully satisfied with the product of the compromise, for in the nature of the process each one gives away something of one's position"; that "we have before us in this conference report what I believe to be the only bill that it is possible to obtain under all the circumstances"; that "in the 12 days during which the conference met the majority of the Senate conferees secured important changes in the restrictive provisions of the Landrum-Griffin bill, thereby protecting traditional and essential rights of workmen seeking to improve conditions of employment;" and that "it is important that the Senate should note these changes" (105 Cong. Rec. 17878-17899 (1959); II *Leg. Hist.* 1431-1432). Congressman Thompson made similar statements to his colleagues in the House. See 105 Cong. Rec. 18133-18134 (1959); II *Leg. Hist.* 1720-1721.

because the section would then be a content-based restriction on truthful expression. But, as respondent union apparently concedes (Br. 38) and, in any event, as this Court has repeatedly held, suitably tailored content-based restrictions are permissible with respect to speech that occupies a less central position in the hierarchy of First Amendment values. See, e.g., *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 772 n.24 (1976) (prohibition against prior restraints inapplicable); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985) (regulation of truthful information permissible); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 & n.7 (1983) (content or viewpoint-based restriction of speech permissible). And, as we explained in our opening brief (at 33-40), the speech involved here—an explicit request to consumers to boycott neutral businesses in order to coerce those businesses into entering the fray on the union’s side—is best analyzed in terms of the standards applied to regulation of these less central categories of expression; indeed, the decision in *Safeco*, which upheld against constitutional attack a restraint on a union’s truthful efforts to promote a consumer boycott of a neutral employer in order to win a primary labor dispute, is determinative of this point. The union’s arguments to the contrary do not withstand analysis.

a. The union first argues (Br. 38-40) that *Safeco* is distinguishable because it involved picketing rather than handbilling. But Section 8(b)(4)(ii)(B) regulates only the speech aspect of picketing—the content of the message—and its constitutionality must be judged (and was judged by a majority in *Safeco*) on that basis.⁹ Justice Powell’s plurality opinion in *Safeco* drew no distinction between picketing and other forms of communication: it focused (447 U.S. at 616) on the “unlawful objective” of the union’s appeal (i.e., the coercion of the neutral employer), an unlawful objective that does not vary with the means of communication used. Similarly, Justice Blackmun’s concurring opinion, citing his own concurring state-

⁹ As Justice Black said in his *Tree Fruits* concurrence (377 U.S. at 78), “it is difficult to see that the section in question intends to do anything but prevent dissemination of information about the facts of a labor dispute.” For this reason, Justice Black would have held the statute unconstitutional.

ment in *Police Dep’t v. Mosley*, 408 U.S. 92, 102 (1972), and Justice Black’s concurring opinion in *Tree Fruits*, focused (447 U.S. at 617) on the content selectivity of the statutory ban, a selectivity that also does not vary with the means of communication used; rather, Justice Blackmun concluded (447 U.S. at 617-618) that this content-based ban is constitutional because, in his view, it strikes a permissible balance between “union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.”¹⁰ Thus, the analyses applied by a majority of the Justices in *Safeco* in no way turned on the distinction to which the union points here.

Justice Stevens, the sixth vote in the majority in *Safeco*, while agreeing that “this content-based restriction is permissible” (447 U.S. at 618-619), apparently did so on the ground that, in his view, the section “affects only that aspect of the union’s efforts to communicate its views that calls for an automatic response to a signal, rather than a reasoned response to an idea.” But, with all respect, the picketing involved in *Safeco* was not “signal” picketing, i.e., picketing designed to signal to union members that the union will impose sanctions and other discipline on any member crossing the picket line. It was “publicity” picketing, i.e., picketing designed to tell the general public about the circumstances of a labor dispute and to ask the public to support the union by not patronizing a particular business. See Cox, *Strikes, Picketing and The Constitution*, 4 Vand. L. Rev. 574, 593-594 (1951); Cox, *The Supreme Court 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 Harv. L. Rev. 1, 37-38 (1980) (comment on *Safeco*). That peaceful picketing, like the peaceful handbilling in this case, depended upon the persuasiveness of the union’s message and thus *Safeco*

¹⁰ Justice Blackmun also stated (447 U.S. at 618) that his “vote should not be read as foreclosing an opposite conclusion where another statutory ban on peaceful picketing, unsupported by equally substantial governmental interests, is at issue.” He did not suggest, as the respondent union contends (Br. 39), that he would distinguish between picketing and nonpicketing activity that does traverse the substantial governmental interest in protecting neutrals from being coerced into participating in others’ labor disputes.

cannot be distinguished on the ground on which Justice Stevens at least partially relied.¹¹ What Section 8(b)(4)(ii)(B) bars is a message, given by the union for secondary purposes and outside the protections of the proviso, asking consumers to boycott a neutral business; there is no reason why it should be constitutional to apply that bar to a message conveyed by otherwise wholly lawful picketing, but unconstitutional to apply it to the same message when conveyed by distribution of handbills. Rather, as Professor Cox notes (94 Harv. L. Rev. at 39), the measure of protection under the First Amendment must derive from the kind of speech involved, the governmental interest in regulating that speech, and the balance between the speech and governmental interests. In these terms, as we explained in our opening brief (at 34), the First Amendment question that was decided in *Safeco* is the same as the First Amendment question presented here.¹²

¹¹ Of course, the persuasiveness of the message in *Safeco* depended in part—as here and always—on its emotional appeal. But the distinction between the reasoned and emotional response to a message is not a sound basis on which to rest constitutional differences. As Professor Cox notes in his comment on *Safeco* (94 Harv. L. Rev. at 38-39):

Almost any set of symbols or ideas may set in motion a variety of reasoned and unreasoned, deliberate and automatic responses. Does the sickly youth choose Marlboro cigarettes in “reasoned response” to the virility exhibited in the advertising of Marlboro Country? What about the purchaser who selects Noxema shaving cream in response to the blond siren’s seductive plea [to] “Take it off. Take it all off.”? An automatic or a reasoned response? Surely many, if not most, political speeches include appeals to automatic associations and loyalties as well as to reason. Whether a response is automatic rather than reasoned depends partly upon the temperament of the observer and partly upon his habits, associations, and settled convictions. The character of the response will not serve to measure the availability of protection under the first amendment.

¹² *Babbitt v. Farm Workers*, 442 U.S. 289 (1979), does not, as the union implies (Br. 9 n.3, 40), state that the government may ban consumer picketing but not other forms of publicity directed to consumers. In *Babbitt*, the Court abstained from deciding whether a state law proscribing consumer publicity in agricultural labor disputes was constitutional because the state courts could yet construe the prohibition in a way that would avoid the constitutional concerns altogether (442 U.S. at 305-312). While the Court noted that “difficulties would arise were the section interpreted to intercept publicity by means other

b. The respondent union spends the remainder of its brief (at 41-50) critiquing our effort to place the decision in *Safeco* and the constitutional question here in the broader context of this Court’s modern First Amendment jurisprudence. But that critique rests on a series of erroneous statements.

(1) The respondent union initially errs in suggesting (Br. 41-43) that the Court has recognized only a single category of speech which does not receive full First Amendment protection—i.e., commercial speech. In fact, “[i]n the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech,” but “[o]ther areas of the law provide further examples” (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 n.5 (1985) (opinion of Powell, J.)). The Court has, for example, accorded reduced First Amendment protection to speech of public employees on matters of personal interest (see, e.g., *Connick v. Myers*, 461 U.S. 138 (1983)), to reports of a credit reporting agency (see, e.g., *Dun & Bradstreet, Inc.*), and to indecent but not obscene language (see, e.g., *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)). See also *Ohrlik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978) (citations omitted) (listing “the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers’ threats of retaliation for the labor activities of employees” as examples of communications that receive reduced First Amendment protection).

(2) The union’s next argument (Br. 43-46), that the attributes that labor speech shares with these other categories of speech do not justify according labor speech such limited First Amendment protection, is a broadside attack on the Court’s First Amendment jurisprudence. The attributes in question are

than picketing” (*id.* at 311 n. 17), since “picketing is qualitatively ‘different from other modes of communication’ ” (*ibid.* (citations omitted)), the Court also noted that, “[w]ere the consumer publicity provision interpreted to intercept only those expressions embodying a threat of force, the issue of its constitutional validity would assume a character wholly different from the question posed by appellees’ construction” (*id.* at 312).

the very "commonsense differences" that the Court has said distinguish categories of fully protected and lesser protected speech. See *Bolger v. Youngs Drug Products Corp.*, 463 U.S. at 66-68; *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-566 (1980); *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. at 761-773. While none of these "commonsense differences" is itself dispositive, "[t]he combination of *all* these characteristics * * * provides strong support for the * * * conclusion" that a particular form of speech is properly treated as less central to the concerns of the First Amendment (*Bolger v. Youngs Drug Products Corp.*, 463 U.S. at 67). See also *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, No. 86-270 (June 25, 1987), slip op. 11-18; *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. at 761-763.¹³

(3) Finally and most importantly, the union's argument (Br. 43, 46-49) that its handbilling is entitled to the highest level of First Amendment protection because it does not involve the "hawking of wares" mischaracterizes the message that is being regulated here. Section 8(b)(4)(ii)(B) does not prevent the union from expressing any social, moral, or economic views it may have, from publicizing its views about its dispute with High, or, indeed, from publicly making most of the statements contained

¹³ The union mischaracterizes our position when it suggests (Br. 45-46) that the Board's position "cannot be squared" with *First National Bank v. Bellotti*, 435 U.S. 765 (1978), and *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980). Those cases hold that a corporation's comment on public issues is entitled to full First Amendment protection even though the corporation may have an economic interest in speaking on those matters. But no one is contending here that a message of general public interest should be accorded reduced constitutional protection because the union also has an economic interest. The Board's contention, explained in our opening brief (at 39-40), is that the message "PLEASE DON'T SHOP * * *" should receive reduced constitutional protection because: (a) it is addressed to a particular labor dispute and not to issues of public concern; and (b) its purpose is to coerce neutral businesses into aiding the union in that dispute; and (c) the conduct of labor disputes is traditionally subject to government regulation. Together, these factors make the union's speech analogous to commercial speech. Accord, *Cox*, *supra*, 94 Harv. L. Rev. at 39; *Roberts v. United States Jaycees*, 468 U.S. 609, 637-638 (1984) (O'Connor, J., concurring).

in the handbills that gave rise to this case. Section 8(b)(4)(ii)(B) only prevents the union from asking consumers to boycott neutral businesses in order to facilitate its resolution of a labor dispute with High.¹⁴ In the relevant sense, the speech involved here does in fact resemble the "hawking of wares." Accord, *Cox*, *supra*, 94 Harv. L. Rev. at 39 ("the gain sought and the action requested are both economic"). In any event, the other categories of speech that the Court has found of less central concern to the First Amendment also often do not involve the literal "hawking of wares." See, e.g., *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, slip op.

¹⁴ Thus, as explained in our opening brief (at 43-44), Section 8(b)(4)(ii)(B) does not prohibit the union from informing the public of the facts of its dispute with the primary employer or from appealing to the public not to do business with that employer. Nor does Section 8(b)(4)(ii)(B) prohibit appeals to customers of a secondary employer under circumstances that would not reasonably cause the secondary employer to fear a general loss of business. And, by virtue of the publicity proviso, Section 8(b)(4)(ii)(B) allows the union to engage in appeals that are coercive of a secondary employer, provided that the secondary employer is in the chain of distribution with the primary employer and the other conditions specified in the proviso are met.

Such a narrowly drawn regulation of union speech is fully consistent with *Thornhill v. Alabama*, 310 U.S. 88 (1940). While the Court held in *Thornhill* that the First Amendment bars a state from enacting a blanket ban against peaceful picketing, since it would "impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern" (310 U.S. at 104), the Court also recognized that "the rights of employers and employees to conduct their economic affairs * * * are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants" (*id.* at 103-104 (footnote omitted)). Section 8(b)(4)(ii)(B) is an example of the reasonable limits that the Court had in mind.

This conclusion is also consistent with *Thomas v. Collins*, 323 U.S. 516 (1945). In that case, the Court invalidated a state registration requirement that restricted the right of union organizers to solicit employees to join a union. The Court said that such a restriction on speech was impermissible absent a showing of a "substantial interest of the community" (*id.* at 536); and it added that "persuasion," either by unions or employers, was protected under the First Amendment so long as it was not "coercive" (*id.* at 538, citing *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469 (1941)). In this case, the respondent union's handbilling is ~~not~~ neutral employers and there is a substantial governmental interest in protecting those neutral employers from "coerced participation in industrial strife" (*Safeco*, 447 U.S. at 617-618 (Blackmun, J., concurring in part)).

coercive
of

12-12, 16-18 (a communication may be classified as commercial speech even though it does not "propose a commercial transaction"); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. at 66-68 (same); *Connick v. Myers*, 461 U.S. at 147-148 (speech concerning internal office affairs entitled to reduced First Amendment protection). Rather, as noted above, these other categories of speech reflect all three of the "commonsense differences" to which we pointed in our opening brief (at 37-38). As we also explained in our opening brief (at 38-40), so does much labor speech, including the speech involved here.¹⁵

¹⁵ We again note Justice Stewart's concurring opinion in *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. at 775-781. In that opinion, Justice Stewart noted, among other things, that "[t]he scope of constitutional protection of communicative expression is not universally inelastic" (*id.* at 778) and that many restrictions in the labor-management relations context are justifiable even though they "would be constitutionally intolerable if applied in the political arena" (*id.* at 778 n.3). Of course, the Court has itself acted on this premise. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982); *NLRB v. Gissel Packing Co.*, 395 U.S. 579, 616, 618-620 (1969).

The respondent union attempts to distinguish *Claiborne Hardware* by suggesting (Br. 40-41 n. 26) that that case's discussion of "[s]econdary boycotts and picketing by labor unions" referred to boycotts carried out by picketing (as in *Safeco*) or pursuant to an order to union members (as in *Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 214-215 (1982)). But while the boycott in *Claiborne Hardware* was accompanied by intermittent picketing (458 U.S. at 903), it was also furthered by "speech in its most direct form" (*id.* at 909). Indeed, the basic issue in the case was whether a boycott supported by "persuasive rhetoric, determination to remedy past injustices, and a host of voluntary decisions by free citizens" could be regulated "consistent with the Constitution of the United States" (*id.* at 888-889). It is thus reasonable to conclude that the Court was referring not merely to picketing but to the kind of activity involved in *Claiborne Hardware*, when it drew a distinction between regulation of "communication associated with" a boycott organized for economic ends and one organized for purely political ends (*id.* at 914-915).

The respondent union attempts to distinguish *Gissel* by asserting (Br. 49 n.30) that "[a]ll that *Gissel* teaches is that an employer's threat to take unlawful action is not protected speech, and that in determining whether a particular statement amounts to a threat, the Labor Board is entitled to 'take into account the economic dependence of the employees on the employers.'" But the employer's threat in *Gissel* was unlawful because it coerced employees in the exercise of their organizational rights, and Congress could constitutionally proscribe such coercive speech in "balanc[ing] an employer's free

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), discussed in our opening brief (at 44-45 n.20) and in the union's brief (at 49-50), is wholly consistent with our position here. *Keefe* involved a protest on a matter of public concern—i.e., a protest of alleged blockbusting tactics by a community organization concerned with preserving racially integrated neighborhoods. The Court held that the prevention of public criticism of the offending real estate broker was not a sufficient governmental interest to justify enjoining the organization's leafletting. *Keefe* involved no secondary activity; indeed, the leafletting in *Keefe* was not even directed to the real estate broker's customers. The parallel here would be a publicity appeal informing the public of High's alleged refusal to meet union wage standards. As we explained in our opening brief (at 43), nothing in Section 8(b)(4)(ii)(B) would preclude the union from engaging in such an appeal.

For these reasons, as well as those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROSEMARY M. COLLYER
General Counsel
National Labor Relations Board

JANUARY 1988

speech right to communicate with his employees against the employees' rights to associate freely * * * (Young v. American Mini Theatres, 427 U.S. 50, 68 n.31 (1976)). Thus, as Justice Stewart stated in his concurring opinion in *Virginia Pharmacy Bd. v. Virginia Consumer Council*, *supra*, *Gissel* "establishes that a regulatory scheme monitoring the 'impact of utterances' is not invariably inconsistent with the First Amendment" (425 U.S. at 778-779).

AMICUS CURIAE

BRIEF

In The
Supreme Court of the United States
October Term, 1987

THE EDWARD J. DeBARTOLO CORP.,
Petitioner,

v.

FLORIDA GULF COAST BUILDING AND
CONSTRUCTION TRADES COUNCIL,
and
NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF
THE UNITED STATES AS AMICUS CURIAE
IN SUPPORT OF PETITIONER

EDWARD B. MILLER
KATHRYN M. COCHRAN

*Attorneys for the Chamber of
Commerce of the United States
as Amicus Curiae*

Of Counsel:

POPE, BALLARD, SHEPARD
& FOWLE, LTD.
69 West Washington Street
Chicago, IL 60602
(312) 630-4200

STEPHEN A. BOKAT, ESQ.
THE NATIONAL CHAMBER LITIGATION
CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

TABLE OF CONTENTS

	<i>Page</i>
I. Interest of the Amicus Curiae.	2
II. Summary of Facts and Proceedings.	4
III. Summary of Argument.	5
IV. Argument	7
A. Section 8(b)(4) Prohibits Handbilling Which Has an Object or Effect Repugnant to the Purposes of the Act	7
1. The Court Below Should Have First Ex- amined and Construed Section 8(b)(4)'s Language.	7
2. The Language of Section 8(b)(4) and the Publicity Proviso Demonstrate Congress' Intent to Include Handbilling Within the Scope of the Act's Prohibitions.	8
3. Section 8(b)(4)'s Legislative History Confirms Congress' Intent to Prohibit Unlawful Handbilling.	11
B. Prior Decisions of this Court Establish That Boycotts Are Coercive, and That They May Be Prohibited, Whether Induced by Handbilling or Otherwise, When in the Interest of Rational Federal Policies, Without Running Afoul of the First Amendment.	14
1. Boycotting and the Inducement Thereof Is Coercive.	14

	<i>Page</i>
2. Laws Prohibiting The Inducement of Boycotts Have Been Held to Prohibit Inducement by Non-Threatening Words Without Violating the First Amendment	17
3. Words Used to Induce Unlawful Boycotts Are Not Immunized by the First Amendment – The “Verbal Act” Theory and the Balancing of Interests Theory . . .	20
4. The Protections Applicable to Certain Political Boycotts Are Not Applicable to Federally Prohibited Commercial Boycotts	25
Conclusion	30

AUTHORITIES CITED

Cases:	<i>Page</i>
<i>Albernaz v. United States</i> , 450 U.S. 333 (1981)	7
<i>Bakery Drivers v. Wohl</i> , 315 U.S. 722 (1944).	21
<i>Bates v. Little Rock</i> , 316 U.S. 516 (1960)	27
<i>Bozhorn's Big Muskego Gun Club v. Electrical Workers Local 494</i> , 798 F.2d 1016 (7th Cir. 1986) . .	10
<i>Carpenters Union v. Ritters Cafe</i> , 315 U.S. 722 (1941). .	26
<i>Central Hudson Gas & Electric Corp. v. Public Service Commission</i> , 447 U.S. 557 (1986)	27
<i>Chapman v. Houston Welfare Rights Organization</i> , 441 U.S. 600 (1979)	7
<i>Commodity Futures Trading Comm'n v. Schor</i> , 478 U.S. —, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986). .	7, 24
<i>Consumer Product Safety Comm'n. v. GTE Sylvania, Inc.</i> , 447 U.S. 102 (1980)	8
<i>DeBartolo v. NLRB</i> , 662 F.2d 264 (4th Cir. 1981)	4
<i>Duplex Co. v. Deering</i> , 254 U.S. 433 (1921)	17
<i>Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.</i> , 365 U.S. 127 (1961)	25
<i>Eastern States Retail Lumber Dealers' Association v. United States</i> , 234 U.S. 600 (1913)	14, 15
<i>Edward J. DeBartolo Corp. v. NLRB</i> , 463 U.S. 147 (1983)	2, 4, 9

<i>Florida Gulf Coast Building and Construction Trades Council v. NLRB</i> , 796 F.2d 1328, reh'g. denied, 806 F.2d 1070 (11th Cir. 1986)	2, 5
<i>Florida Gulf Coast Building Trades Council</i> , 252 NLRB 702 (1980)	4
<i>Florida Gulf Coast Building Trades Council</i> , 273 NLRB 1431 (1985)	5
<i>Gompers v. Bucks Stove and Range Company</i> , 221 U.S. 418 (1911)	20, 21
<i>Honolulu Typographical Union No. 37 v. N.L.R.B.</i> , 401 F.2d 952 (D.C. Cir. 1968)	16
<i>Honolulu Typographical Union No. 37</i> , 167 NLRB 1030 (1967), enf'd. in part, 401 F.2d 952 (D.C. Cir. 1968)	15, 20
<i>Hospital and Service Employees Union, Local 399 (Delta Air Lines)</i> , 263 NLRB 996 (1982)	15, 16
<i>International Brotherhood of Electrical Workers v. National Labor Relations Board</i> , 341 U.S. 694 (1951)	18
<i>Klor's, Inc. v. Broadway - Hale Stores, Inc.</i> , 359 U.S. 207 (1959)	15
<i>Lawlor v. Loewe</i> , 235 U.S. 522 (1914)	14
<i>Local No. 662, Radio and Television Engineers (Middle South Broadcasting)</i> , 133 NLRB 1698 (1961)	15
<i>NAACP v. Claiborne Hardware, Inc.</i> , 458 U.S. 886 (1981)	25, 29

<i>NLRB v. Catholic Bishop of Chicago</i> , 440 U.S. 489 (1978)	7, 8
<i>NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)</i> , 377 U.S. 58 (1964)	9, 12, 16
<i>National Labor Relations Board v. Retail Store Employees Union, Local 1001 (Safeco)</i> , 447 U.S. 607 (1980)	19, 21
<i>National Labor Relations Board v. United Brotherhood of Carpenters</i> , 184 F.2d 60 (10th Cir. 1950), cert. denied., 341 U.S. 947 (1951)	19
<i>Northwest Airlines, Inc. v. Transport Workers Union</i> , 451 U.S. 77 (1981)	7
<i>Organization for A Better Austin v. Keefe</i> , 402 U.S. 415 (1971)	29
<i>State of Missouri v. National Organization for Women, Inc.</i> , 620 F.2d 1301 (8th Cir. 1980)	15, 25
<i>United States v. Hutchison</i> , 312 U.S. 219 (1941)	23
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968)	25
<i>United States v. Turkette</i> , 452 U.S. 576 (1981)	7

Other Authorities

Statutes	Page
29 U.S.C. § 52.	23
29 U.S.C. § 102.	23
29 U.S.C. § 158(b)(4)(ii)(B).	2, <i>passim</i>
29 U.S.C. § 158(b)(7).	10
29 U.S.C. § 158(c).	19

Legislative History

Page

1 & 2 NLRB <i>Legislative History of the Labor Management Reporting and Disclosure Act of 1959</i> ("Leg. Hist.") 29 <i>et seq.</i>	11, <i>passim</i>
1 Leg. Hist. 76.	11
1 Leg. Hist. 84, <i>et seq.</i>	11
1 Leg. Hist. 142.	11
2 Leg. Hist. 254, <i>et seq.</i>	11
105 Daily Cong. Rec. 6232 (April 17, 1959), 2 Leg. Hist. 1037	12
Thompson & Udall, 105 Daily Cong. Rec. 14203 (August 11, 1959), 2 Leg. Hist. 1576.	12
105 Daily Cong. Rec. 15222 (August 20, 1959), 2 Leg. Hist. 1708	12
Senator Kennedy, 105 Daily Cong. Rec. 15900 (August 28, 1959), 2 Leg. Hist. 1377.	12
105 Daily Cong. Rec. 16414 (September 3, 1959), 2 Leg. Hist. 1432	13
Remarks of Senator Thompson, 105 Daily Cong. Rec. 16635 (September 4, 1959), 2 Leg. Hist. 1720	12

Books and Articles

Page

- Cox, *Strikes, Picketing and the Constitution*, 4 Vand. L. Rev. 574 (1950-51) 21
- Goldman, *The First Amendment and Nonpicketing Labor Publicity Under Section 8(b)(4)(ii)(B) of the National Labor Relations Act*, 36 Vand. L. Rev. 1469 (1985) 27
- Haiman, *Speech and Law in a Free Society* (1981). 21, 26
- Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 Tex. L. Rev. 1071 (1987). . . . 27
- Comment, *The Common-law and Constitutional Status of Antidiscrimination Boycotts*, 66 Yale L.J. 397 (1957) 14
- Note, *Labor Picketing and Commercial Speech: Free Enterprise Values In the Doctrine of Free Speech*, 91 Yale L.J. 938 (1982). 27

No. 86-1461

In The
Supreme Court of the United States
October Term, 1987

THE EDWARD J. DeBARTOLO CORP.,
Petitioner,

v.

FLORIDA GULF COAST BUILDING AND
CONSTRUCTION TRADES COUNCIL,
and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF
THE UNITED STATES AS AMICUS CURIAE

This brief *amicus curiae* is filed with the written consent of the parties. The letters giving consent have been separately filed with the Court.

I. INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States (the "Chamber") is a federation consisting of more than 180,000 corporations, partnerships, and proprietorships, as well as several thousand trade associations and state and local chambers of commerce. It is the largest association of business and professional organizations in the United States.

A significant aspect of the Chamber's functions involves its representation of its member-employers in important labor relations matters. The Chamber has advanced those interests in a wide spectrum of labor relations litigation before this and other courts. The Chamber appeared as an *amicus curiae* both before this Court in *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147 (1983) ("DeBartolo I"), and in the proceedings before the Court below, *Florida Gulf Coast Building and Construction Trades Council v. NLRB*, 796 F. 2d 1328, *reh'g. denied*, 806 F.2d 1070 (11th Cir. 1986).

The issues presented in this case are matters of substantial importance to the Chamber's members. Those questions are whether union handbilling advocating a total consumer boycott of neutral secondary employers constitutes "threats, restraint or coercion" within the prohibition of Section 8(b)(4)(ii)(B) of the National Labor Relations Act (the "Act"), 29 U.S.C. § 158(b) (4)(ii)(B),¹ and, if so, whether that prohibition violates the First Amendment.

¹ Section 8(b)(4)(ii)(B), in pertinent part, provides:

It shall be an unfair labor practice for a labor organization or its agents . . . to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . . forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. . . .

The Chamber's members have a vital interest in being protected against involvement in labor disputes to which they are not parties and over which they have no control.

For many years the Chamber and other business groups urged the Congress of the United States to enact, and subsequently to strengthen, prohibitions against secondary boycotts. Since 1959, when Congress strengthened the secondary boycott prohibitions of the law, neutral employers have been reasonably well protected against coercive secondary activity, whether induced by picketing, handbilling, or other means. Non-coercive, truthful publicity advising that products produced by an employer in a labor dispute are distributed by a secondary employer, however, has been permitted, so long as such publicity does not induce secondary employees to withhold services from the employer engaged in the said distribution.

The decision of the Court of Appeals for the Eleventh Circuit would instead create a very broad exemption for handbilling and all other forms of non-picketing publicity, even though its purpose is to induce a boycott of a neutral, secondary employer. This unprecedented narrowing of the secondary boycott prohibitions enacted by the Congress in 1959 is of the most serious concern to the Chamber's members and to the entire business community.

For these reasons, the Chamber supports the position of the Petitioner and urges this Court to reverse the decision of the Eleventh Circuit Court of Appeals and to enforce the Board's order prohibiting the respondent Union's secondary boycott activity.

II. SUMMARY OF FACTS AND PROCEEDINGS

Petitioner DeBartolo is the owner of a large shopping mall in Tampa, Florida. Approximately 85 retail establishments are tenants of the mall. One of the mall's tenants, H.J. Wilson Company, Inc., contracted with High Construction Company to build a store for Wilson at the mall. Respondent Florida Gulf Coast Building Trades Council, AFL-CIO became involved in a primary labor dispute with High Construction Company over the payment of allegedly substandard wages and benefits. The Union distributed handbills at the entrances to the mall urging that customers not patronize tenants of the mall.

Petitioner filed an unfair labor practice charge, alleging that the Union was engaging in a secondary boycott, and the National Labor Relations Board's General Counsel issued a complaint against the Union alleging that such activity constituted a violation of Section 8(b)(4)(ii)(B) of the Act, 29 U.S.C. § 158(b)(4)(ii)(B).

The Board concluded that this handbilling was not prohibited under the "publicity proviso" to Section 8(b)(4) and dismissed the complaint. Its decision in 252 N.L.R.B. 702 (1980) was affirmed by the U. S. Court of Appeals for the Fourth Circuit. *DeBartolo v. NLRB*, 662 F. 2d 264 (4th Cir. 1981). In *Edward J. DeBartolo Corp. v. N.L.R.B.*, 463 U.S. 147 (1983) (*DeBartolo II*), this Court reversed the decision of the Fourth Circuit, holding that the Union's conduct fell outside the protection of the publicity proviso, but remanded for a determination of whether the distribution of the handbills violated the underlying restrictions of the Act and for a consideration of First Amendment issues.

On remand, the NLRB found that the distribution of the handbills was coercive and violated the applicable provisions of the law. The Board did not decide the constitutional issue, stating instead that it was obliged as an administrative agency to presume the constitutionality

of the Act it administered. *Florida Gulf Coast Building Trades Council*, 273 NLRB 1431 (1985).

The Court of Appeals for the Eleventh Circuit held that the Act's prohibition of coercive secondary activity did not clearly prohibit handbill distribution urging such secondary activity. The Court interpreted the legislative history of the section to indicate a Congressional intent to prohibit only secondary picketing, and interpreted the publicity proviso as merely a clarification "that the prohibitory language does not reach primary picketing or nonpicketing publicity." *Florida Gulf Coast Building and Construction Trades Council v. National Labor Relations Board*, 796 F. 2d 1328, 1345 (11th Cir. 1986). Because the court opined that interpreting the statute to prohibit handbilling for the purpose of inducing secondary boycotting would give rise to serious First Amendment questions and because the Court found no affirmative intention of Congress to prohibit such activity, the Court denied enforcement of the Board's order.

Petitioner DeBartolo thereupon filed a petition for certiorari, which petition this Court has now granted.

III. SUMMARY OF ARGUMENT

It is the Chamber's position that the Court of Appeals for the Eleventh Circuit has erred seriously in its reading of the applicable statute, in its interpretation of legislative history, and in its understanding of First Amendment precedent.

The language of the 1959 amendments is, on its face, plainly prohibitive of efforts to induce secondary boycotting of neutral employers whether induced by picketing or by other forms of communication, such as handbills. When the Congress, in enacting the various subsections of Section 8(b), sought to regulate or prohibit only picketing, it did so in express terms. Section 8(b)(4), however, protects neutral, secondary employers from all coercive action, whether induced by picketing or otherwise.

Coercion has long been interpreted by this Court to include the inducement of boycotts, whether the said inducement was threatening or non-threatening to the persons or entities urged to participate in the boycott.

The legislative history corroborates this plain meaning of the words of the law, and demonstrates the intent of Congress to prohibit *all* coercion, including boycotts induced by any means other than the truthful communication to consumers that struck products are being distributed by a named neutral, secondary employer.

This Court has made clear that such a Congressional prohibition of boycott inducement, when consistent with rational and constitutionally based federal policy, does not run afoul of First Amendment guarantees, even when peaceful, non-threatening means are used to induce or encourage persons or entities to join in the boycott.

Although inducement of certain political boycotts is not prohibited at common law, the inducement of boycotts deemed injurious to the public interest may be prohibited by federal statutory law, when such legislation has a rational basis and is within the constitutional powers of Congress, such as its power to regulate interstate commerce.

The National Labor Relations Act, in Section 8(b)(4), prohibits secondary boycotts when utilized for the objectives proscribed in that section. It is qualified by a narrowly defined publicity proviso. This statutory prohibition is a rational and constitutionally authorized exercise of Congress' power to regulate interstate commerce.

The legislative purpose was to confine the area of labor disputes to the parties directly involved, both in the interest of fairness to neutrals and to limit the impact of such disputes on interstate commerce. That was well within Congressional powers, and its peripheral impact on First Amendment rights is not constitutionally forbidden.

IV. ARGUMENT

A. Section 8(b)(4) Prohibits Handbilling Which Has an Object or Effect Repugnant to the Purposes of the Act.

In its decision below, the Eleventh Circuit relied on Section 8(b)(4)'s legislative history to smother Congress' intent in 1959 to regulate comprehensively secondary conduct.

In taking this course, the Court below appears to have tangled this Court's approach to statutory construction in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 489 (1978), and to have seriously misread Section 8(b)(4).

1. The Court Below Should Have First Examined and Construed Section 8(b)(4)'s Language

This Court has established the rule, no matter what verbal formula is used to describe it, that the task for a court in reviewing a statute is to ascertain the legislature's intention in passing the statute under consideration, and to carry that intention into effect to the fullest degree possible. *Commodity Futures Trading Comm'n. v. Schor*, 478 U.S. ___, 106 S.Ct. 3245, 92 L.Ed.2d 675, 686 (1986).

The starting point for the interpretation of a statute is unquestionably the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, language must ordinarily be regarded as conclusive on the legislature's intent. *Albernaz v. United States*, 450 U.S. 333 (1981). See also *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981); *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979); *United States v. Turkette*, 452 U.S. 576, 580 (1981).

This Court has repeatedly recognized the difficulty of negotiating the unpredictable eddies and currents of legislative history comprised of opinions expressed in debates, committee reports, and the statements of supporters and

opponents to particular legislation. Reference to legislative debates will throw light on the history and conditions giving rise to a particular enactment, or to the general purpose of the statute, but will not serve as conclusive evidence of the actual meaning of the language of a statute when the language itself makes that meaning clear. *Consumer Product Safety Comm'n. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

This Court's search in *Catholic Bishop* for the plain meaning of the NLRA's jurisdictional provision did not desert these time tested principles of statutory construction, as the Eleventh Circuit's decision below implies. The Court did not turn to legislative history as an aid to construction until after examining the statute's language. *Catholic Bishop* does not stand for the proposition that the necessity of construing Congressional intent so as to avoid violations of the Constitution requires abandoning statutory language in favor of vague excerpts selectively lifted out of the overall context of legislative history. The Eleventh Circuit should instead have undertaken an analysis of the language in Section 8(b)(4) and its proviso before resorting to the vagaries of legislative history.

2. The Language of Section 8(b)(4) and the Publicity Proviso Demonstrate Congress' Intent to Include Handbilling Within the Scope of the Act's Prohibitions

The language Congress used in Section 8(b)(4) demonstrates an intent to prohibit secondary boycotts as broadly as possible, and the concurrent intent to do so reasonably, consonant with the First Amendment.

Section 8(b)(4) prohibits activity by a union or its agents which is designed to "threaten, coerce, or restrain any person...." This is certainly a broad category. Congress refined it, however, to provide that the more particular class of conduct prohibited is the "forcing or requir-

ing any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person." From this narrower category of prohibited conduct, Congress first specifically exempted any primary strike or primary picketing.

The proviso to 8(b)(4)(ii)(B) then also excludes certain specifically defined types of "publicity, other than picketing." Since it excepts "picketing" from this proviso, secondary picketing is still covered under subparagraph 4's general prohibition.

Not all "publicity, other than picketing" is excluded. The next clause, beginning "for the purpose of," limits the protected publicity to that which truthfully advises the public that products produced by the primary employer involved in a labor dispute are being distributed by another. If even this carefully defined and limited type of publicity has the effect of inducing employees of the neutral, secondary distributor to cease work, it is no longer protected by the proviso. This Court has recognized the interaction of these requirements in its prior decision in this case. See *DeBartolo I*, 463 U.S. at 153-54.

Congress' intent is abundantly clear from the language of 8(b)(4) and the publicity proviso. In *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*, 377 U.S. 58 (1964), this Court recognized both that (a) the prohibitions of Section 8(b)(4)(ii)(B) include forms of communication *other than picketing*, and (b) even the excluded non-picketing communication has limitations as to scope and is subject to a further exception if it induces employees to withhold services. The Court said:

The proviso indicates no more than that the Senate conferees' constitutional doubts led Congress to authorize publicity *other than picketing* which persuades the customers of a secondary employer to stop all trading with him, *but not such publicity which has the effect of cutting off his deliveries or*

inducing his employees to cease work. (Emphasis supplied.)

Id. at 70-71.

The Seventh Circuit has also observed that since the publicity proviso speaks of publicity "other than picketing," it is obvious that the prohibitions from which the proviso was carving an exception covered secondary activity "other than picketing." In *Boxhorn's Big Muskego Gun Club v. Electrical Workers Local 494*, 798 F. 2d 1016 (7th Cir. 1986), that Court said at 1024:

The publicity proviso to Section 8(b)(4) provides in part that subparagraph (4) "shall not be construed to prohibit publicity. . . ." If the statute is limited to picketing, then the publicity proviso is a pointless gesture, exempting a subset of publicity none of which is covered to begin with. We are reluctant to treat the publicity proviso as so much blather.

When placed alongside other 1959 amendments to Section 8(b), it becomes even clearer that the amendments to to Section 8(b)(4) were not limited to picketing. Section 8(b)(7), 29 U.S.C. § 158(b)(7), for example, was another amendment added to the law in 1959. The language of that Section is limited specifically to picketing, and is aimed at picketing for recognition. It does not extend to any other kind of oral or written publicity or inducement aimed at securing union recognition. Thus when Congress wanted to aim a prohibition solely at picketing and not at other forms of publicity or inducement, it obviously knew how to do so. It did not do so in amending Section 8(b)(4).

The language of the statute itself, although complex, is plainly intended to prohibit *all* inducement of prohibited boycotts except that which is specifically defined and limited by the proviso. Handbilling which is for a proscribed secondary objective and is not within the proviso is violative of the plain language of the law.

3. Section 8(b)(4)'s Legislative History Confirms Congress' Intent to Prohibit Unlawful Handbilling

The legislative history confirms that the Section's prohibition of secondary boycott activity extends to handbilling, and that the proviso was intended to, and does, accommodate the minority's concern that dissemination of truthful advice to the public by means other than picketing about distribution of struck goods should not be prohibited if it did not have undesirable effects on the neutral's employees.

The Kennedy-Ervin Bill (S.505, as introduced on January 20, 1959; later referred to committee with technical amendments as S.1555) amended § 8(b) but did not amend § 8(b)(4) as it had been enacted in 1947. 1 Leg. Hist. 29 *et seq.*² Section 602 of that bill amended § 8(b) only by adding a prohibition of picketing on or about any employer's premises for the purpose of personal profit or extortion. 1 Leg. Hist. 76. Senator Goldwater, however, along with a number of other Senators, on January 28, 1959, introduced S.748. In its Section 503(a), S.748 did amend 8(b)(4) so as to prohibit threatening, coercing, or restraining any person engaged in commerce if the object was one of four specifically set forth in his bill. 1 Leg. Hist. 84 *et seq.* One of those proscribed objects included the type of cessation of patronage involved in the instant case. 1 Leg. Hist. 142.

The original House bill (H.R.4474, 2 Leg. Hist. 254 *et seq.*), introduced by Congressman Barden, from the very beginning amended 8(b)(4) to prohibit this type of secondary activity in the same manner as Senate bill 748. 2

² All citations to 1 & 2 NLRB *Legislative History of the Labor Management Reporting and Disclosure Act of 1959* will appear herein in this abbreviated form along with the parallel citation to the Daily Congressional Record, where appropriate.

Leg. Hist. 254-256.

Neither the Senate nor the House bills specifically mentioned handbilling. But as Justice Harlan recognized after a thorough review of § 8(b)(4)(ii)(B)'s legislative history with respect to Congress' intent regarding peaceful consumer picketing, it is remarkable that each time the class of appeals to consumers not to patronize, including handbilling, was considered, both opponents to and supporters of the House bill assumed the bill prohibited all such activity. *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760* ("Tree Fruits"), 377 U.S. at 92 (Harlan, T., dissenting).

The breadth of these proposed prohibitions against proscribed secondary action distressed some. In debate on Senator Goldwater's proposed amendment to § 8(b)(4), Senator Humphrey, for example, expressed the fear that "the union by this amendment is now to be effectively sealed off from even an appeal to the consumers." 105 Daily Cong. Rec. 6232 (April 17, 1959), 2 Leg. Hist. 1037. Congressman Thompson concluded that the House bill's prohibition "reaches not only picketing but leaflets, radio broadcasts, and newspaper advertisements." 105 Daily Cong. Rec. 15222 (August 20, 1959), 2 Leg. Hist. 1708. See also Thompson & Udall, 105 Daily Cong. Rec. 14203 (August 11, 1959), 2 Leg. Hist. 1576, and Remarks of Senator Thompson, 105 Daily Cong. Rec. 16635 (September 4, 1959), 2 Leg. Hist. 1720.

The Senate Conference Committee therefore addressed these concerns by excluding from the amendment to 8(b)(4) "the traditional right to ask the public *not to patronize one who sells nonunion goods or goods of a manufacturer engaged in a labor dispute.*" Senator Kennedy, 105 Daily Cong. Rec. 15900 (August 28, 1959), 2 Leg. Hist. 1377. (Emphasis supplied.) Senator Kennedy, in the conference committee's report, said concerning the conference bill:

Under the Landrum-Griffin bill it would have been impossible for a union to *inform the customers of a secondary employer that that employer or store was selling goods which were made under racket conditions or sweatshop conditions, or in a plant where an economic strike was in progress.* We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but we were able to persuade them to agree that the union shall be free to conduct informational activity short of picketing. In other words, the union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory picketing in front of a secondary site. (Emphasis supplied.)

(105 Daily Cong. Rec. 16414, September 3, 1959, 2 Leg. Hist. 1432.)

It is important to note that the conference committee and Senator Kennedy accurately described the context, and thus the intent, of the proviso. The context was to protect the right to inform consumers that a secondary employer was *selling struck or non-union products* produced by a targeted primary employer — no more and no less.

The Eleventh Circuit seeks to relegate this explanation to a mere expression of minority views, and thus accords it little weight. But when the bill including the proviso, which was to become law, left the conference committee for final debate, Kennedy was its supporter, not its opponent, precisely because the bill then contained the publicity proviso he had worked hard to adopt in conference to alleviate the minority's concerns. His opinion of the proviso's aim and scope is therefore entitled to great weight, not to the short shrift the Eleventh Circuit gave it.

Contrary to the decision of the Eleventh Circuit, the legislative history of Section 8(b)(4) serves to affirm the intent of Congress to outlaw *all* conduct, including hand-

billing, which coerces secondary employers, unless the non-picketing publicity is for the purpose of truthfully advising consumers that a secondary employer who is a distributor is selling struck products made by a primary disputant.³

B. Prior Decisions of this Court Establish That Boycotts Are Coercive, and That They May Be Prohibited, Whether Induced by Handbilling or Otherwise, When in the Interest of Rational Federal Policies, Without Running Afoul of the First Amendment

1. Boycotting and the Inducement Thereof Is Coercive

Boycotts are, by their nature, coercive, and inducement of boycotts is coercive on the boycotted business.⁴

This Court has long recognized that the use of publicity to induce others to participate in a boycott is coercive. In *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U.S. 600 (1913), an association circulated notices to its members intended to persuade dealers not to buy from certain wholesalers. There were no threats to the dealers – merely an effort to persuade them not to deal with the named wholesalers. This conduct was held by this Court to place the wholesalers “under the coercive influence of a condemnatory report circulated among others.” *Id.* at 614. (Emphasis supplied.)

This Court in *Lawlor v. Loewe*, 235 U.S. 522 (1914) noted, at 534:

³ Even then the handbilling or other publicity is prohibited if it induces employees to cease using, handling, etc., the struck product.

⁴ A boycott is “the use of economic coercion to compel certain conduct on the part of a businessman, the coercion consisting of a concerted refusal to deal with the business until the boycotters’ demands are met.” *The Common-law and Constitutional Status of Antidiscrimination Boycotts*, 66 Yale L.J. 397 (1957).

Whatever may be the law otherwise, that case [referring to the *Eastern States Lumber Dealers* case] establishes that, irrespective of compulsion or even agreement to observe its intimation, the circulation of a list of ‘unfair dealers,’ manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers combined with a view to joint action and in anticipation of such reports, is within the prohibitions of the Sherman Act if it is intended to restrain and restrains commerce among the States.

The Court also described the effect of the boycott as having been:

... that they carried out their plan with such success that they have *restrained or destroyed* the plaintiff’s commerce with other States.

Id. at 533. (Emphasis supplied.)

The Eighth Circuit Court of Appeals, in *State of Missouri v. National Organization for Women, Inc.*, 620 F. 2d 1301 (1980), said at 1314:

And the Court in *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, *supra*, very pointedly made clear that boycotts are *destructive*. . . .

In view of this long standing recognition by this Court, in an antitrust context, that boycotts and the inducement of boycotts are coercive, restraining, and even destructive, and that they unlawfully restrain commerce, it is hardly surprising that the National Labor Relations Board has consistently interpreted the words “to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce” as including the inducement of proscribed boycotts. *Hospital and Service Employees Union, Local 399 (Delta Air Lines)*, 263 NLRB 996 (1982); *Honolulu Typographical Union No. 37*, 167 NLRB 1030 (1967), *enf’d.* in part, 401 F. 2d 952 (D.C.Cir. 1968). *Cf. Local 662, Radio and Television Engineers (Middle South Broadcasting)*, 133 NLRB 1698 (1961) (finding no violation, but

acknowledging that urging a consumer boycott would constitute "restraint or coercion" and a violation if the conduct involved fell outside the protection of the publicity proviso).

The coercive effect of such boycotts has rarely been contested. It has been conceded in such cases as *Hospital and Service Employees Union, Local 399 (Delta Airlines)*, 263 NLRB 996 (1982), at 997, and has been assumed, *sub silentio*, in by the Court of Appeals for the District of Columbia Circuit in *Honolulu Typographical Union No. 37 v. N.L.R.B.*, 401 F. 2d 952 (D.C. Cir. 1968) and by this Court in *National Labor Relations Board v. Fruit and Vegetable Packers and Warehousemen, Local 760 (Tree Fruits)*, 377 U.S. 58 (1964). In *Tree Fruits*, this Court refused to enforce a Board order which would have prohibited both picketing and handbilling. It did so, not on the ground that the handbilling was not within the scope of Section 8(b)(4)'s prohibitions but only on the narrow ground that a selective boycott of products – i.e., urging consumers not to buy the primary producer's products from the neutral – was not the kind of secondary boycott intended by Congress to be within the prohibitions of Section 8(b)(4)(ii).

These concessions by the parties and *sub silentio* assumptions by the courts during all these years since 1959 is, we suggest, readily explainable by the long standing precedential recognition by the courts, including this Court, that both boycotting and the inducement of boycotting are coercive. There is no legal or common sense reason to alter that well-established precedent. To boycott and to induce boycotts are "to coerce" – the key phrase in Section 8(b)(4)(ii)(B). This Court, we urge, should so hold.

2. Laws Prohibiting the Inducement of Boycotts Have Been Held to Prohibit Inducement by Non-Threatening Words Without Violating the First Amendment

The court below, in holding that there was a serious concern about First Amendment rights, recognized that the Union:

hoped to coerce the mall tenants to pressure DeBartolo to force High, with whom the Union has a primary dispute, to use Union standards.

796 F. 2d at 1335.

The court, despite having thus expressly found an intent to coerce secondary employers (the tenants), nevertheless expressed First Amendment concerns because the handbilling did not coerce the consumers receiving the handbills. The court said:

However, a finding of statutory coercion would not control the First Amendment analysis. While the focus of § (8)(b)(4)(ii)(B) is coercion of the secondary employer, the secondary employer vis-a-vis the handbill is a non-listener. The handbills in this case lacked any elements which could threaten, coerce or restrain the listeners; i.e., the consumers.

Id. at 1335.

This analysis by the court below is patently flawed. This Court has repeatedly held that the inducement of a statutorily prohibited coercive boycott, even by means which were peaceful and non-threatening to the recipient of the inducing literature, is beyond the protection of the First Amendment.

In the preceding section of this Argument, we have referred to some of the antitrust cases in which such non-threatening inducement of secondary customer boycotts was held to be violative of the antitrust laws. In yet another such antitrust case, *Duplex Co. v. Deering*, 254 U.S. 433 (1921) the Court made abundantly clear its views

on this point. It said, after reviewing earlier decisions:

It is settled by these decisions that *such a restraint produced by peaceable persuasion is as much within the prohibition [of the antitrust laws] as one accomplished by force or threats of force; . . .*

Id. at 467. (Emphasis supplied.)

This Court has expressed similar views with respect to the statutory prohibitions of secondary boycotts contained in the National Labor Relations Act.

For example, the Act's prohibitions of peaceful inducement of boycotting by *employees* of secondary employers has been held to create no First Amendment problems in *International Brotherhood of Electrical Workers v. National Labor Relations Board*, 341 U.S. 694 (1951). That case arose prior to the 1959 amendments, which are at issue here. It dealt with the portion of the statute which is now contained in Section 8(b)(4)(i) which prohibits inducing or encouraging individual employees of secondary employers to engage in a strike or refusal to handle, or work on, items for the purposes prohibited by Section 8(b)(4). It was alleged in that case that peaceful picketing should be exempted from the condemnation of this section. This Court said, however:

The words 'induce or encourage' are broad enough to include in them every form of influence and persuasion. There is no legislative history to justify an interpretation that Congress by those terms has limited its proscription of secondary boycotting to cases where the means of inducement or encouragement amount to a 'threat of reprisal or force or promise of benefit.'

Id. at 701-702.

The court went on to find specifically that the statutory prohibition of non-threatening, peaceful inducement or encouragement of secondary pressure "carries no unconstitutional abridgement of free speech." *Id.* at 705.

Again, in *National Labor Relations Board v. Retail Employees Union, Local 1001 (Safeco)*, 447 U.S. 607, 616 (1980), this Court said of secondary picketing:

Such picketing spreads labor discord by coercing a neutral party to join the fray. . . . As applied to picketing that encourages customers to boycott a secondary business, § 8(b)(4) (ii)(B) imposes no restrictions upon constitutionally protected free speech.

Similarly, placing a neutral contractor on a "We do not patronize" list circulated to potential customers of that contractor has been held to violate Section 8(b)(4)(A) of the Act prior to the 1959 amendments. *National Labor Relations Board v. United Brotherhood of Carpenters*, 184 F. 2d 60 (10th Cir. 1950), *cert. denied*, 341 U.S. 947 (1951). Answering a contention that to so construe the Act would violate the free speech guarantees of Section 8(c) of that Act (29 U.S.C. § 158(c)), the court said:

And they placed Klassen [the neutral] on a so-called black-list and gave wide circulation of the fact among those particularly interested in the building industry, all for the purpose of compelling Klassen to cease doing business with Wadsworth [the primary employer in the labor dispute]. There is nothing in the language or legislative history of section 8(c) which indicates persuasively [sic] a Congressional intent to create an asylum of immunity from the proscription of Section 8(b)(4)(A) for acts and conduct of that kind.

Id. at 62. The Court also summarily rejected a contention that the Act as so construed would violate the First Amendment, saying at 62:

The contention is not well taken and does not call for extended discussion.

We respectfully submit that if inducement of a secondary boycott by employees by non-coercive means (peaceful picketing) may be prohibited without infringing upon First Amendment protection, and if encouragement of a

consumer secondary boycott, also by non-coercive means (peaceful picketing) can be prohibited without infringing upon First Amendment protection, and if placing a neutral contractor on a "Do Not Patronize" list can be prohibited without infringing upon First Amendment protection, then it necessarily follows that inducing a coercive secondary consumer boycott by other non-coercive means (peaceful handbilling) is similarly not entitled to First Amendment protection.

3. Words Used to Induce Unlawful Boycotts Are Not Immunized by the First Amendment - The "Verbal Act" Theory and the Balancing of Interests Theory

One rationale for finding the inducement of boycotts by peaceful means to be subject to congressional prohibition without infringing First Amendment rights was explained in *Gompers v. Bucks Stove and Range Company*, 221 U.S. 418 (1911). There this Court affirmed the propriety of contempt proceedings against a union which had violated an injunction against continuing a prohibited boycott. The violations included publicizing that the Bucks Stove and Range Company was on the Union's "Unfair" or "Do Not Patronize" lists.⁵ The Court said, at 439:

... the agreement to act in concert when the signal is published, gives the words "Unfair," "We don't patronize," or similar expressions, a force not inherent in the words themselves, and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances they become what have been called "verbal acts," and as much subject to injunction as the

⁵ Note the similarity between the inducement to boycott in the *Gompers* case and the "Do Not Patronize" lists found violative of Section 8(b)(4)(ii)(B) in *Honolulu Typographical Union No. 37*, 167 NLRB 1030 (1967), enf'd. in part, 401 F. 2d 952 (D.C. Cir. 1968).

use of any other force whereby property is lawfully damaged.

This "verbal act" or "signal" rationale has also been relied upon to find unlawful secondary boycott picketing, as well as the secondary boycott publicity involved in *Gompers*.⁶ See, for example, Justice Douglas' concurring opinion in *Bakery Drivers v. Wohl*, 315 U.S. 769, 776-777 (1944), and Archibald Cox' article, in which he opines that "signal picketing" is entitled to no greater constitutional protection than the combination it sets in motion". *Strikes, Picketing and the Constitution*, 4 Vand. L. Rev. 574, 599 (1950-51).

This "verbal act" or "signal" doctrine has been criticized by some scholars. Northwestern University Professor Haiman, for example, seriously questions the premise that words can justifiably be viewed as functioning like acts.⁷ He suggests an alternative rationale, which may

⁶ Justice Stevens has suggested that handbilling is less of a "verbal act" or a "signal" than picketing. See his separate concurrence in *National Labor Relations Board v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. 607 at 618. The Court in *Gompers v. Bucks Stove and Range Company*, however, held that "Do Not Patronize" and similar slogans used in the labor relations context are signals whether they appear in publicity or on picket signs. When union handbillers, acting in concert, appear at the entrances to a mall and distribute handbills saying "PLEASE DON'T SHOP AT EAST SQUARE MALL," it is difficult to see why shoppers would not be as reluctant to enter the mall as if the same union handbillers had carried picket signs bearing the identical legend, "PLEASE DON'T SHOP AT EAST SQUARE MALL."

⁷ In his book, F. Haiman, *Speech and Law in a Free Society* (1981), he says, at 25:

But calling words "action" does not change their symbolic nature. Rather it confuses matters by attempting to make certain contextual considerations which may

(Footnote continued on the following page)

be described as a "balancing of interests" approach, justifying some intrusions on totally unrestricted speech by regulatory laws, in the interest of governmental economic policies, particularly where the restrictions are a trade-off for other legislatively conferred privileges. He points out that Congress, having granted certain other privileges to labor organizations, may, in turn, extract a certain price – i.e., place some limitations on free speech when regulating some of the activities of labor organizations. He argues, for example, that such limitations:

... may be justified within the limited confines of labor-management relations, where they may be viewed as the First Amendment price that has been paid for special picketing privileges that have been legislatively granted in return. For example, labor organizations have rights under Section 7 of the NLRA to picket in privately owned shopping centers where they and others would not have such a right, according to the Supreme Court, under the First Amendment.

Id. at 237.

He goes on to say:

As for the special rules of labor law that prohibit such union activities as secondary boycotts, I believe that an acceptable rationale is the same as that presented for restrictions on picketing at secondary sites. We should also note that unions have received a special privilege in exemptions

7 (Continued)

justify restrictions appear to be inherent to the speech itself.

* * *

This does not mean that symbolic behavior can never be restrained if the context in which it occurs justifies such limits. Rather, if it is to be curbed, we will be clear that it is contextual considerations that are responsible and not that words have, by the magic of redefinition, been transformed into acts.

from the antitrust laws, a necessary concomitant of the rights to strike and boycott, which are by definition 'combinations in restraint of trade.'

Id. at 239.

It would be presumptuous for us to review for this Court the legal history which led up to the Congress and the courts granting very substantial immunity to labor unions from prosecution under the antitrust laws⁸ and freedom from injunctive relief in most labor disputes under the Norris-LaGuardia Act.⁹ When Congress became aware that, because of these exemptions and privileges, labor unions were able to bring about injurious boycotts with impunity, it acted to limit the permissible scope of such boycotts essentially to the primary employer involved in the labor dispute. It thus struck a balance between the rights of labor unions to invoke a full range of economic weapons in support of its position in a labor dispute and a perceived right of neutral employers to be free from unwitting involvement in disputes not of their making. While Congress left untouched much of the unions' immunity from federal court injunction suits brought by employers, it bestowed solely on the National Labor Relations Board the right to seek injunctions to enforce the statute's limitations on secondary picketing and boycotts.

Also left intact was the unions' exemption from antitrust laws. Through specific amendments of the labor laws, however, Congress prohibited unions from engaging in certain secondary boycotts. But the principle established in the earlier anti-trust cases – i.e., that Congressional prohibition of nonthreatening inducement of boycotts is not an infringement of First Amendment rights – has not been changed either by Congress or by subsequent decisions of

⁸ *United States v. Hutchison*, 312 U.S. 219, 252 (1941), interpreting Section 6 of the Clayton Act, 29 U.S.C. § 52.

⁹ 29 U.S.C. § 102.

this Court.

The balance of interests which has been developed by Congress and the courts, whereby antitrust and private injunctive restraints on most union activity have been supplanted by carefully drawn legislative restraints enforceable only by a public agency, surely justifies a narrow prohibition on speech that induces a breach of the federal labor laws.

The publicity proviso narrows even further this intrusion on speech. That proviso has been accorded full respect by the Board and by this Court. Such restriction on speech as remains is only that necessary to the attainment of the purposes of Section 8(b)(4), and the First Amendment should not be used to frustrate the achievement of those purposes.

This Court's long-standing acknowledgement that Congress can impose certain restrictions on speech in the interest of important federal policy goals would be eviscerated if the type of timidity the Eleventh Circuit demonstrates regarding constitutional issues were to replace a straightforward evaluation and acceptance of Congressional intent. To do so, as we have demonstrated, is not violative of the First Amendment, and the Eleventh Circuit's concerns, while understandable, were vastly overstated. As this Court has stated, the obligation to construe statutes to avoid constitutional questions, when possible,

does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication; '[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it.

Commodity Futures Trading Comm'n v. Schor, 478 U.S. ___, 106 S.Ct. 3245, 92 L.Ed.2d 675, 686 (1986) (citations omitted).

4. The Protections Applicable to Certain Political Boycotts Are Not Applicable to Federally Prohibited Commercial Boycotts

It is true that the inducement of *unregulated* boycotts by peaceful persuasion may be lawful, protected activity, where the objective of such boycotts is political and is consistent with public policy. An effort to secure legislation favorable to railroads was found political and protected even though one of the techniques used in the publicity was to injure truckers by creating public resentment of truckers in an effort to obtain public support for the desired legislation. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Relying on this precedent, publicity urging boycotting in order to bring pressure on the legislature to enact equal rights laws for women has been found lawful, *State of Missouri v. National Organization for Women*, 620 F. 2d 1301 (8th Cir. 1980), as has publicity to induce boycotting to obtain freedom from discrimination for black people. *NAACP v. Claiborne Hardware, Inc.*, 458 U.S. 886 (1981).

But when the federal government steps in, by Congressionally authorized regulation, to protect innocent persons or entities from certain prohibited boycotts in industries affecting commerce, that is quite another matter. Then the protection accorded to *unregulated* boycotts for political purposes no longer applies, and incidental restrictions on free speech must yield to the purposes of the regulation. As this court said in *NAACP v. Claiborne Hardware Co.*, *supra*:

Governmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances. See *United States v. O'Brien*, 391 U.S. 367. A non-violent and totally voluntary boycott may have a disrupting effect on local economic conditions. This court has recognized the strong governmental interest in certain forms of eco-

conomic regulation even though such regulation may have an incidental effect on rights of speech and association . . . Secondary boycotts and picketing by labor unions may be prohibited, as part of Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.

Id. at 912.¹⁰

In *Carpenters Union v. Ritters Cafe*, 315 U.S. 722 (1941), in upholding the power of the state of Texas to confine the area of a labor dispute to primary disputants, this Court said, at 725-726:

But the circumstance that a labor dispute is the occasion of exercising freedom of expression does not give that freedom any greater constitutional sanction or render it completely inviolable. Where, as here, claims on behalf of free speech are met with claims on behalf of the state to impose reasonable regulations for the protection of the community as a whole, the duty of this Court is plain.

The boycott sought to be induced here had as its objective not legislation or protection of employees' statutory rights. Its objectives were straightforwardly economic — i.e., obtaining union contract rates and benefits for its members who worked for the primary employer, High Construction Company. There is no need in this case to determine whether some labor boycotts may be decreed "political." We are aware, in any event, of no decisions holding that even a "political" boycott may not be regulated by Congress if it affects interstate commerce and if the boycott induced by the regulated activity itself contravenes a care-

¹⁰ This rationale is not substantially different from that suggested by Professor Haiman, referred to in this brief at 22-23, *supra*.

fully developed, rational federal labor policy. Some regulation of speech for that purpose meets both the tests for regulating "commercial speech" set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1986) and also the more general test of *Bates v. Little Rock*, 316 U.S. 516 (1960), a case not involving "commercial speech". This Court said in *Bates*, at 525:

When it is shown that state action threatens significantly to impinge upon constitutionally protected freedom, it becomes the duty of this court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification.

We suggest, in any event, that some strongly pro-union professors in academia have reached rather far beyond reality in their recent efforts to frustrate Congressional regulation of secondary boycotts by seeking to widen the mantle of First, Thirteenth, and any other available Amendment protection to sanction virtually all consumer picketing and boycotting.¹¹ Some, like Professor Pope in the *Texas Law Review*, understandably go astray by starting with the plainly erroneous assumption that there is a constitutional right to strike. Professor Goldman, in the *Vanderbilt Law Review*, climbs high into the ivory tower and finds in speech urging unlawful consumer boycotts the values of "(a) individual self-fulfillment, (b) advancement of knowledge and discovery of truth, (c) participation in open discussion by all members of the community, and (d) a balance between stability and change." The Eleventh

¹¹ Note, *Labor Picketing and Commercial Speech: Free Enterprise Values In the Doctrine of Free Speech*, 91 *Yale L. J.* 938 (1982); Goldman, *The First Amendment and Nonpicketing Labor Publicity Under Section 8(b)(4)(ii)(B) of the National Labor Relations Act*, 36 *Vand. L. Rev.* 1469 (1985); Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 *Tex. L. Rev.* 1071 (1987).

Circuit engages in similar hyperbole when it says in footnote 7 of its opinion:

It would seem that a strong argument could be made that the Union was expressing social and moral values. . . .

We suggest a return to earth. The plain fact is that in this case, as in most union-urged secondary boycotts, the union is seeking to hurt the business of a neutral in an effort to bring pressure on an unrelated employer to influence the primary employer to give the union's members a larger piece of the economic pie. It is hard to imagine a more obvious economic interest than that.

What seems to be missed by both the Eleventh Circuit and the law review authors is that the statute does not prohibit "publicity" as such, but only the urgings to violate the secondary boycott provisions of the Act. Publicity which says that a theater is showing racist films is entitled to First Amendment protection, but if it concludes by urging that the theater be burned down, it no longer is mere free speech. Likewise, a union may inform the public of its views about a labor dispute, but when it concludes by urging an unlawful secondary boycott, the "publicity" is no longer free speech.

The Chamber of Commerce of the United States is vitally concerned with this issue. The lack of protection for neutral employers against the abuse of union power began to change in 1947. But only in the 1959 amendments was genuine protection given by closing significant loopholes in the 1947 legislation. Now the labor movement asks this Court to strip away a significant portion of that protection by stretching the First Amendment beyond any prior interpretation given to that Amendment by this Court, and by seriously misreading the statute. The Chamber of Commerce urges that it would be inappropriate for a decision to issue here which would turn back the clock on legislative progress by over 50 years.

In the instant case, the purpose of the handbilling falls directly within the prohibited purposes of Section 8(b)(4) – i.e., to widen the area of the labor dispute by inducing a boycott of retailers who were in no way involved in, and could not control, the labor dispute between High Construction Company and the Building Trades Council. Section 8(b)(4)(ii)(B) was enacted for the purpose of preventing precisely this kind of unfair expansion of labor disputes and its resultant increased interference with commerce.

The Eleventh Circuit's reliance on the political boycott cases – *Organization for A Better Austin v. Keefe*, 402 U.S. 415 (1971) and *Claiborne Hardware, supra*, – is misplaced. This was not a political boycott; it was a secondary labor boycott for the purpose of achieving specific economic objectives by inducing the coercion of neutrals in direct violation of the intent of the 1959 amendments. The use of words – whether on handbills or on picket signs – to induce such a prohibited coercive boycott is not within the protective reach of the First Amendment.

CONCLUSION

The decision of the Eleventh Circuit Court of Appeals should be reversed and the order of the National Labor Relations Board should be enforced.

Respectfully submitted,

EDWARD B. MILLER

KATHRYN M. COCHRAN

*Attorneys for the Chamber of
Commerce of the United States
as Amicus Curiae*

Of Counsel:

POPE, BALLARD, SHEPARD

& FOWLE, LTD.

69 West Washington Street

Chicago, IL 60602

(312) 630-4200

STEPHEN A. BOKAT, Esq.

THE NATIONAL CHAMBER LITIGATION

CENTER, INC.

1615 H Street, N.W.

Washington, D.C. 20062

(202) 463-5337

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED

AUG 22 1987

JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1461

In the
Supreme Court of the United States

OCTOBER TERM 1986

THE EDWARD J. DeBARTOLO CORP.,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

FLORIDA GULF COAST BUILDING TRADES COUNCIL, AFL-CIO,

Intervenor.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE ELEVENTH CIRCUIT

**Brief Amicus Curiae of the International Council
of Shopping Centers, Inc., in Support of Petitioner**

EDWARD J. SACK
STEPHANIE McEVILY
INTERNATIONAL COUNCIL OF
SHOPPING CENTERS
665 Fifth Avenue
New York, NY 10022
(212) 421-8181

13 PM

TABLE OF CONTENTS

Interest of the <i>Amicus Curiae</i>	1
--	---

ARGUMENT

Distributing Handbills at All Entrances to a Shopping Mall is Coercive Within the Meaning of the Secondary Boycott Provision of the National Labor Relations Act	2
--	---

POINT I—The union's distribution of handbills "predictably encourage[d] consumers to boycott a secondary business"	2
--	---

POINT II—If the decision of the Eleventh Circuit is permitted to stand, shopping center tenants all over the country may be enmeshed in labor disputes that do not concern them	5
---	---

POINT III—The free speech issue has already been decided by the Supreme Court	7
---	---

Conclusion	8
------------------	---

TABLE OF AUTHORITIES

Cases:

<i>Bedding, Curtain & Drapery Workers Union, Local 140 v. N.L.R.B.</i> , 390 F.2d 502 (2d Cir.), cert. denied, 392 U.S. 905 (1968)	3, 4
--	------

<i>Hudgins v. N.L.R.B.</i> , 424 U.S. 507 (1976)	7
--	---

<i>Lloyd Corp. Ltd. v. Tanner, et al.</i> , 407 U.S. 551 (1972)	7
---	---

<i>N.L.R.B. v. Retail Store Employees</i> , 447 U.S. 607 (1980)	2, 4
---	------

<i>Service Employees Local 339 v. N.L.R.B.</i> , 117 LRRM 2717 (9th Cir. 1987)	3
--	---

<i>Teamsters, Local 812 v. N.L.R.B. (Monarch Long Beach Corp.)</i> 105 LRRM 2658 (D.C. Cir. 1980) ...	3, 4, 5
---	---------

Statutes:

National Labor Relations Act, 29 U.S.C. 158(b)(4)
(ii)(B) *passim*

Miscellaneous:

Brief *Amicus Curiae* for the International Council of
Shopping Centers, Inc., in Support of Petitioner 4

Shopping Center Development Handbook, The Urban
Land Institute (2d ed. 1985) 6

1987 *Shopping Center Directory*, The National Re-
search Bureau (1986) 6

Shopping Center World, January, 1987 6

Wisconsin Survey Research Laboratory, "The Wis-
consin Shopping Center Survey," March 18, 1986
(University of Wisconsin - Extension) 5

In the
Supreme Court of the United States

OCTOBER TERM 1986

THE EDWARD J. DEBARTOLO CORP.,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

FLORIDA GULF COAST BUILDING TRADES COUNCIL, AFL-CIO,
Intervenor.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE ELEVENTH CIRCUIT

**Brief *Amicus Curiae* of the International Council of
Shopping Centers, Inc., in Support of Petitioner***

Interest of the *Amicus Curiae*

The International Council of Shopping Centers, Inc. ("ICSC"), is the trade association of the shopping center industry. Members of the ICSC, consisting of shopping center developers, retailers, investors, managers and all others having a professional or business interest in the shopping center industry, are engaged in the day-to-day activities of designing, planning, constructing, managing, financing, developing, leasing and owning shopping centers and their retail stores. ICSC has approximately 22,000 members, and the approximately 20,000 located in the

* This brief is submitted with the written consent of counsel to the three parties filed with the Clerk of the Court. The consent letters are being filed concurrently herewith.

United States represent a majority of the shopping centers in this country. The ICSC is the only U.S. trade association specific to shopping centers.

ICSC's members have a clear interest in the disposition of the present case. The holding of the court below would permit unions to handbill or urge a secondary boycott of all tenants in a shopping center in the event of a dispute between a labor union and a contractor doing business with an individual tenant. Because this affects the legal rights of every shopping center in the United States, the ICSC requests that the Court recognize the importance of this case to the business operations of the shopping center industry. ICSC respectfully submits this brief to bring to the Court's attention the views and arguments of its members.

Reference is made to the brief of the petitioner for a statement of the facts of this case and the applicable statutes. This brief will be confined to the aspects of the case specifically related to shopping centers.

ARGUMENT

Distributing Handbills at All Entrances to a Shopping Mall is Coercive Within the Meaning of the Secondary Boycott Provision of the National Labor Relations Act.

POINT I

The union's distribution of handbills "predictably encourage[d] consumers to boycott a secondary business."¹

Many courts have discussed the definition of "coercion" under the NLRA. The Supreme Court's definition in *Retail Store Employees* is particularly appropriate in this case. The Court there defined coercion as conduct which "predictably encourages consumers to boycott a business."² Since then, lower courts have discussed the meaning of the

term. The Ninth Circuit Court of Appeals and the District of Columbia Court of Appeals have both addressed the issue of what is coercive under Section 8(b)(4)(ii)(B) of the National Labor Relations Act (NLRA).³ That section of the statute has the double objective "of preserving the right of the labor organization to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own."⁴ The District of Columbia case, *Monarch Long Beach Corp.*, involved the picketing and handbilling of a retail beverage store for the purpose of urging consumers to buy soft drinks manufactured at local plants. The Court held that the pickets and handbills violated the secondary boycott provision of the NLRA because the result was a total boycott of the secondary employer rather than a boycott of the struck product. A consumer boycott, in the Court's opinion, becomes illegal when it "creates a 'separate dispute' with the neutral,"⁵ and the "extra pressure the union places on the neutral causes more interference with the latter's business than it would suffer as a natural consequence of the union's success in its primary controversy."⁶

The Ninth Circuit, in *Service Employees Local 399 v. N.L.R.B.* (Delta Airlines)⁷ remanded the case to clarify the standard used by the N.L.R.B. to determine that the Union had coerced Delta. The N.L.R.B. had indicated several possible tests of coerciveness under section 8(b)(4)(ii)B. The Union's handbilling was coercive either because it was "designed to bring economic pressure on Delta,"⁸ was "designed to inflict injury on the secondary employer's business,"⁹ or "enmesh[ed] Delta in the primary dispute."¹⁰ Similarly, the Second Circuit held a consumer boycott illegal because it "shut off all trade with the secondary employer" rather than "only persuad[ing] his customers not to buy the struck product."¹¹

Under any of the standards in Delta Airlines or the one contained in the *Monarch Long Beach* case or in the

Supreme Court's decision in the *Retail Store Employees* case, the Union's handbilling in the case now before the Court is coercive.

The Union in the instant case distributed handbills at the entrances to the mall asking potential customers of the mall's tenants not to patronize any of the stores in the mall. The Union was involved in a primary dispute with a construction company that was building a store for one of the tenants. There were 85 other tenants who were not involved in the dispute and whose businesses would suffer if prospective customers complied with the Union's request.

The Union's activity "predictably encourage[d] consumers to boycott a secondary business," which was prohibited by the Supreme Court in the *Retail Store Employees* case. The distribution of the handbills at each mall entrance, rather than at the site of the contractor with whom the Union had the dispute, exerted "extra pressure" and "caused more interference with the [neutral employers'] business than [they] would suffer as a natural consequence of the union's success in its primary controversy."¹² It was definitely "an appeal to shut off all trade with the secondary employer."¹³

Neutral tenants in malls would be subject to involvement in numerous labor disputes if the Eleventh Circuit decision is permitted to stand. As pointed out in ICSC's brief on Petition for a Writ of Certiorari, the number of tenants in a shopping center may vary from nine to 144.¹⁴ The number of possible disputes increases with the number of tenants. Thus the number of situations in which neutral tenants might become enmeshed in primary labor disputes under the Eleventh Circuit's decision is staggering.

The handbills in this case were illegal because they were directed not against the single store involved in the labor dispute, but against all the stores in the shopping center. If the target were solely the store having the dispute, the

circuit court's analogy to the consumer boycotts of agricultural produce would be correct. But the targets were all the tenants in the center, neutrals to the labor dispute, and Section 8(b)(4)(ii)B of the NLRA was intended to protect such neutrals from this kind of coercion. The handbills were clearly coercive. Unless they inflicted damage on the stores in the center, they would have no purpose. Furthermore, the mere act of distributing handbills and creating a public scene, regardless of the message, is damaging to a shopping center.

ICSC has sponsored a survey by an independent, university-based public research organization, which demonstrates that many shoppers would avoid the part of a center in which public interest or even charitable groups were present discussing their views. The survey indicated that 38% of those asked would avoid that part of the center.¹⁵ These shoppers would, in effect, avoid the stores surrounding the area in which groups like the Boy Scouts, Lions or political office-seekers were conducting their activities. It follows that shoppers would be even more likely to avoid an area involved in a labor controversy.

POINT II

If the decision of the Eleventh Circuit is permitted to stand, shopping center tenants all over the country may be enmeshed in labor disputes that do not concern them.

When Congress enacted Section 8 of the N.L.R.A., one of its purposes was "shielding unoffending employers and others from pressures in controversies not their own."¹⁶ If the decision of the Eleventh Circuit stands, innumerable innocent businesses would be adversely affected by labor disputes in which they are not involved.

According to the Eleventh Circuit, a union may post its members at all the entrances to a mall if it has a labor dispute with one of the mall tenants, its contractor,

supplier, or distributor. As discussed above, the neutral tenants in the shopping center will be adversely affected by the dispute. The number of tenants economically harmed by the dispute will vary according to the size of the center. In addition to the number of tenants, there is the diversity of the tenants; *i.e.*, the tenant mix, that provides fuel for the fire. Aside from department stores which typically "anchor" a large shopping center,¹⁷ the center will include many different retailers and services, some of which are chains that are located in many centers. The result is twofold: (1) the number of possible disputes increases as the number of employees, suppliers and distributors increases; (2) the number of sites targeted for handbilling increases.

For example, Edward J. DeBartolo has been described as the largest developer of shopping centers in the nation.¹⁸ In Florida, the DeBartolo Corp. owns and/or manages twenty-four malls.¹⁹ A Jordan Marsh Department Store is located in at least four malls: Omni International of Florida;²⁰ Cutter Ridge Mall;²¹ Dadeland Mall;²² and Miami International Mall.²³ If Jordan Marsh has a labor problem, the Eleventh Circuit decision would permit the union to distribute handbills at all the entrances to all these malls and any others in which this tenant is located.

Many smaller tenants are also located in several malls. Casual Corner and The Athlete's Foot, for example, are in the malls listed above.²⁴ Casual Corner specializes in women's sportswear; The Athlete's Foot, as the name implies, sells athletic footwear. There are many levels at which a labor dispute may occur, from manufacturers of the garments themselves, to the manufacturers of the accessories, to distributors and transporters. Congress did not intend the tentacles of a dispute to reach these boundaries. Not only neutrals located adjacent to the site of the dispute, but neutrals at completely separate sites will be "enmeshed," "pressured" and ultimately coerced.

POINT III

The free speech issue has already been decided by the Supreme Court.

The court below stated that if it were to conclude that the statutory provision in question makes it unlawful for unions to distribute such handbills to the public, "we would be required to consider whether this provision is consistent with the First Amendment." The court, and the parties to the case, have not addressed the fact that the handbills in question were distributed on the property of a shopping center, and the Supreme Court has previously ruled that the First Amendment does not protect the right of unions to conduct labor-related activities in a shopping center.²⁵

The *Hudgins* case held that the right of employees to picket in a shopping center was defined by the National Labor Relations Act, not the First Amendment. Although the case concerned picketing rather than handbilling, the Court has held that neither of these activities are protected by the First Amendment.²⁶ Accordingly, the National Labor Relations Act, if interpreted to prohibit the handbilling in question, cannot be unconstitutional because the Supreme Court held in the *Hudgins* case that there are no constitutional rights to conduct labor-related activities at a shopping center and the only source of such rights is the National Labor Relations Act.

If this Court considers *Hudgins* inapplicable to union handbilling, then this case is governed by the Court's determination in *Lloyd v. Tanner* that the First Amendment does not require shopping Centers to permit handbilling on their premises.²⁷

CONCLUSION

For all the foregoing reasons and those set forth by petitioner, the judgment of the U.S. Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully submitted,

EDWARD J. SACK
STEPHANIE McEVILY
INTERNATIONAL COUNCIL OF
SHOPPING CENTERS
665 Fifth Avenue
New York, NY 10022
(212) 421-8181

FOOTNOTES

1. *N.L.R.B. v. Retail Store Employees*, 447 U.S. 607, 1616 (1980).
2. *Id.*
3. 29 U.S.C. 158(b)(4)(ii)B:
it shall be an unfair labor practice for a labor organization or its agents—
(4) • • • (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce where • • • an object thereof is—
• • •
(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. • • • Provided that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.
4. *Teamsters, Local 812 v. N.L.R.B.* (Monarch Long Beach Corp.), 105 LRRM 2658, 2663 (D.C. Cir. 1980).
5. *Id.* at 2667.
6. *Id.*
7. 117 LRRM 2717 (9th Cir. 1987).
8. *Id.* at 2725.
9. *Id.*
10. *Id.*
11. *Bedding, Curtain & Drapery Workers Union, Local 140 v. N.L.R.B.*, 390 F.2d 502, 503 (2d Cir.), cert. denied, 392 U.S. 905 (1968).
12. *Monarch Long Beach Corp., supra*, note 4 at 2667.

13. *Bedding, Curtain & Drapery Workers v. N.L.R.B.*, *supra*, note 11 to 503.
14. See Brief *Amicus Curiae* of the International Council of Shopping Centers, Inc., in Support of Petitioner, at 2.
15. *The Wisconsin Shopping Center Survey*, Wisconsin Survey Research Laboratory, March 18, 1985 (University of Wisconsin - Extension) at 10.
16. *Monarch Long Beach Corp.*, *supra*, note 4 at 2663.
17. *Shopping Center Development Handbook*, The Urban Land Institute (2d ed. 1985), p. 6.
18. "Top Developer's Survey," *Shopping Center World*, January 1987, p. 58.
19. *Id.* at 94.
20. *1987 Directory of Shopping Centers*, The National Research Bureau (1986) p. 5 - 177.
21. *Id.* at 5 - 170.
22. *Id.* at 5 - 171.
23. *Id.* at 5 - 175.
24. *Id.* at 5 - 170, 171, 175, 177.
25. *Hudgins v. National Labor Relations Board*, 424 U.S. 507 (1976).
26. See *id.* at 520 where the court concludes "that if the respondents in the *Lloyd* case did not have a First Amendment right to enter that shopping center to distribute handbills concerning Vietnam, then the picketers in the present case did not have a First Amendment right to enter this shopping center. . . ."
27. *Lloyd Corp. Ltd. v. Tanner et al.*, 407 U.S. 551 (1972), which held that the First Amendment did not require shopping centers to permit individuals to distribute handbills on the subject of the Vietnam War and the draft.

AMICUS CURIAE

BRIEF

No. 86-1461

Supreme Court, U.S.

FILED

AUG 22 1987

JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

EDWARD J. DeBARTOLO CORPORATION,
Petitioner

vs.

FLORIDA GULF COAST BUILDING
AND CONSTRUCTION TRADES COUNCIL

and

NATIONAL LABOR RELATIONS BOARD,
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

**BRIEF OF AMICUS CURIAE,
AMERICAN RETAIL FEDERATION,
IN SUPPORT OF PETITIONER**

Jack K. Whitacre
(Counsel of Record)
SPENCER, FANE, BRITT & BROWNE
1400 Commerce Bank Building
1000 Walnut Street
Kansas City, Missouri 64106
(816) 474-8100
*Attorneys for Amicus Curiae,
American Retail Federation*

No. 86-1461

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

EDWARD J. DeBARTOLO CORPORATION,
Petitioner

vs.

**FLORIDA GULF COAST BUILDING
AND CONSTRUCTION TRADES COUNCIL**

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

**BRIEF OF AMICUS CURIAE,
AMERICAN RETAIL FEDERATION,
IN SUPPORT OF PETITIONER**

TABLE OF CONTENTS

Table Of Authorities	II
Interest Of Amicus Curiae	2
Summary Of Argument	3
Argument	3
I. Introduction	3
II. The Court Should Defer to the Decision of the Board that Handbilling as a Part of a Secondary Boycott is Prohibited Coercive Conduct Within the Mean- ing of Section 8(b)(4)(ii)(B)	4
III. Handbilling by a Labor Union As a Part of a Sec- ondary Boycott Which Threatens Neutral Parties With Substantial Economic Loss is Not Protected by the First Amendment	5
A. A Labor Union Distributing Handbills as a Part of a Secondary Boycott Coerces Neutral Employ- ers and Employees into the Role of Combatants in Industrial Strife	5
B. Handbilling by a Labor Union As a Part of a Secondary Boycott Organized for Parochial Eco- nomic Ends is Not Entitled to the Same Protec- tion as Political Speech Lying at the Core of the First Amendment	7
Conclusion	10

II

TABLE OF AUTHORITIES

Cases

<i>Amalgamated Food Employee Union Local 590 v. Logan Valley Plaza, Inc.</i> , 391 U.S. 308 (1968)	6, 7
<i>Bates v. State Bar of Arizona</i> , 433 U.S. 350 (1977)	9
<i>Central Hudson Gas v. Public Service Commission of New York</i> , 447 U.S. 557 (1980)	8, 9
<i>Charles D. Bonanno Linen Service v. N.L.R.B.</i> , 454 U.S. 404 (1982)	5
<i>Edward J. DeBartolo Corp. v. N.L.R.B.</i> , 463 U.S. 147 (1983) (DeBartolo I)	3, 4, 6, 8, 9
<i>Florida Gulf Coast Building Trades Council, AFL-CIO and The Edward J. DeBartolo Corporation</i> , 273 NLRB 1431 (1985)	4
<i>Florida Gulf Coast Building And Construction Trades Council v. National Labor Relations Board</i> , 796 F.2d 1328 (11th Cir. 1986)	4
<i>Hudgens v. N.L.R.B.</i> , 424 U.S. 507 (1976)	6
<i>Lovell v. City of Griffin</i> , 303 U.S. 444 (1938)	7
<i>Martin v. City of Struthers</i> , 319 U.S. 141 (1943)	7
<i>N.A.A.C.P. v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982)	7, 9
<i>N.L.R.B. v. Retail Store Employees, Local 1001</i> , 447 U.S. 607 (1980)	6
<i>N.L.R.B. v. Truck Drivers Local Union No. 449</i> , 353 U.S. 87 (1957)	5
<i>Organization for a Better Austin v. Keefe</i> , 402 U.S. 415 (1971)	7
<i>Schneider v. State</i> , 308 U.S. 147 (1939)	7
<i>Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.</i> , 425 U.S. 748 (1976)	8

Statutes

National Labor Relations Act, 29 U.S.C. § 158(b)(4)(iii)(B)	passim
---	--------

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Retail Federation ("Federation") is made up of twenty-seven national associations and fifty state associations of retailers, representing through these member associations one million retail establishments. These retailers range from large, multi-unit enterprises to corner markets and small variety stores and employ approximately sixteen million people. Thus, the Federation is in a unique position to express the interests of this very important segment of the national economy. The Federation regularly represents the interests of its member-employers in important labor relations matters and concerns itself with national issues and problems affecting retailers. It has sought to advance the interests of these retailers by participating in a wide range of labor relations cases before this Court and other courts and in testimony before Congress involving labor legislation.¹

The specific issues presented in this case are whether handbilling by a labor union as a part of a secondary boycott which threatens all the neutral tenants of a shopping center and the neutral owner of a center with substantial economic loss violates Section 8(b)(4)(ii)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(ii)(B) and, if so, whether such activity is protected by the First Amendment.

Many of the Federation's members are shopping center tenants. By and large they are independent, autonomous enterprises. The decision of the Court of Appeals in this case permits coercive secondary activity by the union against neutral retailers for the sole reason that another tenant may be involved with a contractor who may have a dispute with the union. As a result, these neutral retailers will be enmeshed in labor disputes over which they have no control or influence. Furthermore, the decision of the court below will no doubt be read to permit secondary, economic activity against innocent, uninvolved retailers in other contexts. The impact of the

¹All parties consented to the Federation's filing of a brief *amicus curiae* in this case.

decision will be felt by countless retailers and thus this case warrants the participation of the Federation on behalf of its members.

SUMMARY OF ARGUMENT

The secondary boycott provisions of the National Labor Relations Act evidence Congress's overriding concern for the protection of neutral, innocent employers from being enmeshed in labor disputes not their own. The National Labor Relations Board has determined that certain handbilling as a part of a secondary boycott is prohibited coercive conduct within the meaning of Section 8(b)(4)(ii)(B). In reversing the decision of the Board, the Court of Appeals too narrowly confined the discretion granted to the Board by Congress and departed from compelling precedent.

Handbilling by a labor union as a part of a secondary boycott organized for parochial economic ends is not entitled to the same protection as political speech lying at the core of the First Amendment. Rather, such handbilling is commercial speech by a speaker granted special privileges and immunities by federal labor legislation and may be subject to limited regulation as a part of this comprehensive regulatory scheme. For these reasons, handbilling by a labor union as a part of a secondary boycott which threatens neutral parties with substantial economic loss is prohibited by Section 8(b)(4)(ii)(B) and is not protected by the First Amendment.

ARGUMENT

I. INTRODUCTION

In *Edward J. DeBartolo Corp. v. N.L.R.B.*, 463 U.S. 147 (1983) (*DeBartolo I*), this Court limited the scope of the publicity proviso of Section 8(b)(4)(ii)(B) of the National Labor Relations Act ("the Act") to reflect Congressional intent. The Court concluded that the proviso did not sanction secondary handbilling directed at persons outside the producer/distributor chain. It remanded for a determination whether the handbilling was "coercive" within the meaning of Section 8(b)(4)(ii)(B).

On remand, the National Labor Relations Board ("Board") concluded that the union had "engaged in conduct coercive within the meaning of Section 8(b)(4)(ii)(B)" which Congress "intended to proscribe." *Florida Gulf Coast Building Trades Council, AFL-CIO, and The Edward J. DeBartolo Corporation*, 273 NLRB 1431, 1432 (1985). The Board did not consider whether the handbilling was protected by the Constitution, noting that "as a Congressionally created administrative agency, we will presume the constitutionality of the Act we administer." *Id.*

The Court of Appeals for the Eleventh Circuit reversed the decision of the Board in a *per curiam* decision. The court, because it could "ascertain no affirmative intention of Congress clearly expressed to prohibit nonpicketing labor publicity," concluded that the Act prohibited only secondary picketing. *Florida Gulf Coast Building and Construction Trades Council v. N.L.R.B.*, 796 F.2d 1328, 1346 (11th Cir. 1986). The court believed that "if §8(b)(4)(ii)(B) is construed to prohibit certain types of handbilling, serious constitutional questions will arise." *Id.* at 1335.

As we show below, the Court of Appeals too narrowly confined the exercise of the Board's discretion and failed to accord the Board's interpretation appropriate deference. Both the Board and the courts, including this Court in *DeBartolo I*, had properly concluded that certain handbilling is prohibited by the secondary boycott prohibitions at the Act. Furthermore, although the court was correct in its recognition that the Board's interpretation raises constitutional questions, those questions are properly resolved in favor of the prohibition against such secondary handbilling.

II. THE COURT SHOULD DEFER TO THE DECISION OF THE BOARD THAT HANDBILLING AS A PART OF A SECONDARY BOYCOTT IS PROHIBITED COERCIVE CONDUCT WITHIN THE MEANING OF SECTION 8(b)(4)(ii)(B).

This Court has stressed that: "The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board subject to limited judicial

review." *Charles D. Bonnanno Linen Service v. N.L.R.B.*, 454 U.S. 404, 409-10 (1982) (quoting *N.L.R.B. v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957)).

The decision of the Board in this case is clearly a reasonable interpretation of the Act and is entitled to deference. The Board found, as a matter of fact, that the handbilling coerced the mall tenants and owner and that an object of the handbilling was to compel the mall owner to cease doing business with others. The Board correctly held that such conduct is squarely within the plain language of Section 8(b)(4)(ii)(B). 273 NLRB at 1432. In reversing the decision of the Board that the union's distribution of handbills was proscribed by Section 8(b)(4)(ii)(B), the Court of Appeals "too narrowly confined the exercise of the Board's discretion." *Bonnanno*, 454 U.S. at 410. Further, as will be shown in petitioner's brief and other briefs in support of petitioner, the Board, with court approval, has consistently held that the secondary boycott provisions bar certain handbilling which does not come within the publicity proviso.

Since the Court of Appeals should have deferred to the decision of the Board, the remaining issue is whether the First Amendment protects the conduct the Board held the Act prohibits.

III. HANDBILLING BY A LABOR UNION AS A PART OF A SECONDARY BOYCOTT WHICH THREATENS NEUTRAL PARTIES WITH SUBSTANTIAL ECONOMIC LOSS IS NOT PROTECTED BY THE FIRST AMENDMENT.

A. A Labor Union Distributing Handbills As A Part of A Secondary Boycott Coerces Neutral Employers And Employees Into The Role Of Combatants In Industrial Strife.

Congress intended the enactment of Section 8(b)(4)(ii)(B) of the Act "to protect secondary parties from pressures that might embroil

them in the labor disputes of others." *N.L.R.B. v. Retail Store Employees Union, Local 1001*, 477 U.S. 607, 612 (1980)(*Safeco*). The *Safeco* Court correctly observed that tolerance of picketing "that reasonably can be expected to threaten neutral parties with ruin or substantial loss simply does not square with the language or the purpose of §8(b)(4)(ii)(B)." *Id.* at 614-15.

The use of handbilling by a labor union to urge a consumer boycott of the owner and all the tenants of a mall in furtherance of its dispute with a company constructing a store for one tenant of the mall, like secondary picketing, is an attempt to "threaten neutral parties with ruin or substantial loss." The union in this case distributed handbills to potential customers at all four entrances to the mall. The handbills urged customers not to "patronize the stores in East Lake Square Mall until the Mall's owner publicly promises that all construction at the Mall will be done using contractors who pay their employees fair wages and fringe benefits." *DeBartolo I*, 463 U.S. at 150 n.3. The union hoped that its orchestration of a secondary boycott would threaten the mall tenants and mall owner with substantial economic loss and thereby force them to dictate the labor relations terms and conditions to mall construction contractors, the primary employers, or to cease doing business with them.

Secondary boycotts by labor unions may be prohibited in recognition of "Congress' striking of the delicate balance between freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife." *Safeco*, 447 U.S. at 618-19 (Blackmun, J., concurring in part). That "delicate balance" is lost if a union is allowed to distribute handbills in furtherance of a secondary boycott. Whether the union protester carries a placard or distributes a handbill, the intended coercive economic impact of the boycott is identical.

Though the protesting union distributing handbills did not picket or patrol, *DeBartolo I*, 463 U.S. at 151, its presence at every mall entrance involved communications beyond the handbills themselves. As the Court noted in *Amalgamated Food Employee Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 316-17 (1968), overruled on other grounds, *Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976): "Handbilling, like picketing, involves conduct other than speech,

mainly the physical presence of a person distributing leaflets on municipal property." Indeed, handbilling can be more disruptive (and more coercive) than picketing: "Obviously, a few persons walking slowly back and forth holding placards can be less obstructive of, for example, a public sidewalk than numerous persons milling around handing out leaflets." *Logan Valley*, 391 U.S. at 316.

In the context of this case, to allow union handbilling but prohibit union picketing as a mode of communication to effectuate a secondary boycott would be to make a constitutional distinction without a difference. Whether union protesters utilize placards or handbills, both the means and the ends of such a secondary boycott are virtually indistinguishable.

B. Handbilling By A Labor Union As A Part Of A Secondary Boycott Organized for Parochial Economic Ends Is Not Entitled To The Same Protection As Political Speech Lying At The Core Of The First Amendment.

This Court has been reluctant to allow a flat ban of expressions which have "a coercive impact" upon the listener when the goal of the speaker is "to bring about political, social, and economic change." *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982). See also *Organization for A Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (*OBA*).²

In both *Claiborne Hardware* and *OBA*, the protest activity the court determined to be protected by the First Amendment (a boycott and the distribution of leaflets) was aimed at the elimination of racial prejudice and discrimination. Quoting from the opinion of the Fifth Circuit Court of Appeals in *Claiborne Hardware*, the Supreme Court

²*Cf. Martin v. City of Struthers*, 319 U.S. 141 (1943) (civil ordinance prohibiting distributors of literature from ringing doorbell or otherwise summoning occupant of residence held unconstitutional); *Schneider v. State*, 308 U.S. 147 (1939) (city ordinance prohibiting distribution of literature of any kind within city limits held unconstitutional); *Lovell v. City of Griffin*, 303 US 444 (1938) (flat prohibition of distribution of literature held unconstitutional).

emphasized that the "political speech and association" at issue "differentiates this case from a boycott organized for economic ends, for speech to protest racial discrimination is essential political speech lying at the core of the First Amendment." 458 U.S. at 915.

In contrast, the message of the handbills in this case concerned only the parochial economic interests of the protesting union. The accusation contained in the handbills was that: "The Wilson's department store under construction on these premises is being built by contractors who pay substandard wages and fringe benefits." *DeBar-tolo I*, 463 U.S. at 151 n. 3. This was not a protest of wages and benefits which were substandard in any broad sense but were merely lower than those in contracts negotiated by the union. The concern expressed in the handbills is the commercial interest of the union rather than social concerns or legal and constitutional violations. By eliminating differences in wage rates between union contractors and non-union contractors through such secondary pressures, the union increases the likelihood that union contractors will be more competitive, which in turn benefits its membership. A union's expression of dissatisfaction with an employer's payment of legally acceptable pay and benefits is commercial speech, not "political speech lying at the core of the First Amendment."

In *Central Hudson Gas v. Public Service Commission of New York*, 447 U.S. 557, 561-62 (1980), the Court described commercial speech as "expression related solely to the economic interest of the speaker and his audience" and as "speech proposing a commercial transaction." That definition of commercial speech is clearly broad enough to include an expression of the economic interests of a combatant in a labor dispute. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), this Court compared speech concerning the economic interests of a contestant in a labor dispute and commercial speech and found "no satisfactory distinction between the two kinds of speech." *Id.* at 763.

Commercial speech, including the type of labor speech discussed in *Virginia State Board of Pharmacy*, is "in an area traditionally subject to government regulation." *Central Hudson Gas*, 447 U.S. at 562. The Constitution accords a "lesser protection" to labor and

other forms of commercial speech than to non-commercial, constitutionally protected expression. The protection provided a given commercial expression "turns on both the nature and the expression of governmental interests served by its regulation." *Id.* at 562-63.

To be sure, government must assert a substantial interest to be achieved by restrictions on commercial speech if the communication is neither misleading nor related to unlawful activity. The restriction must: (1) directly advance the state interest involved and (2) the limitation of expression must be "designed carefully to achieve the state's goal." *Id.* at 564. However, this Court emphasized in *Central Hudson Gas* that "commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly subsceptible to being crushed by overboard regulation.'" *Id.* at 564 n. 6 (quoting *Bates v. State Bar of Arizona*, 433 U.S. 350, 381 (1977)). In *Claiborne Hardware*, 458 U.S. at 912, the Court "recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association."

The "strong governmental interest" in a comprehensive scheme of federal labor-management relations regulation extends to the balancing of the economic weapons available to both management and labor. The Taft-Hartley Amendments effected this balancing and ensured free collective bargaining to reduce industrial strife and interference with commerce. As a result of the comprehensive federal regulatory scheme, the labor union speaker here enjoyed special privileges and immunities. Limiting the impact of the economic boycott to the primary employer and its distributors, while protecting more distant neutral, secondary employers from becoming enmeshed in the primary dispute, is central to this theme. Thus, the Section 8(b)(4)(ii)(B) limitation on the audiences to which the union may direct its commercial speech is intimately intertwined with the comprehensive regulation and governmental interest.

Finally, as noted above, the Section 8(b)(4)(ii)(B) prohibition of certain secondary handbilling is narrowly tailored to that end. Handbilling of the primary employer or others along the producer/distributor chain would not have been in violation of Section 8(b)(4)(ii)(B), nor could the petitioner have challenged their distribution. *DeBartolo I*, 463 U.S. at 150.

Accordingly, where the limitation arises out of comprehensive labor relations legislation proscribing the economic weapons available to a labor union, which enjoys special privileges and immunities under the same legislation, and where the message conveyed is far removed from social or political speech, the Act, as interpreted by the Board, does not impermissibly intrude on the union's First Amendment rights.

CONCLUSION

Because the decision of the Court of Appeals for the Eleventh Circuit too narrowly confined the discretion of the National Labor Relations Board and because handbilling by a labor union as a part of a secondary boycott designed to threaten neutral parties with substantial economic loss is not protected by the First Amendment, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

JACK L. WHITACRE

(Counsel of Record)

SPENCER, FANE, BRITT & BROWNE

1400 Commerce Bank Building

1000 Walnut

Kansas City, Missouri 64106

(816) 474-8100

Attorneys for Amicus Curiae,

American Retail Federation

AMICUS CURIAE

BRIEF

(13)
No. 86-1461

Supreme Court, U.S.
FILED

OCT 30 1987

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE EDWARD J. DEBARTOLO CORPORATION,

Petitioner,

—v.—

FLORIDA GULF COAST BUILDING AND CONSTRUCTION
TRADES COUNCIL and NATIONAL LABOR RELATIONS
BOARD,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

**BRIEF *AMICUS CURIAE* OF THE AMERICAN
CIVIL LIBERTIES UNION FOUNDATION
IN SUPPORT OF RESPONDENTS**

JOHN A. POWELL
HELEN HERSHKOFF
STEVEN R. SHAPIRO
C. EDWIN BAKER
(Counsel of Record)
American Civil Liberties
Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

ROBERT A. BUSH
CHRISTOPHER D. CAMERON
IRA L. GOTTLIEB
TAYLOR, ROTH, BUSH
& GEFFNER
617 South Olive Street
Suite 1100
Los Angeles, CA 90014
(213) 623-8000

ERIC B. SCHNURER
617 Pine Street
Philadelphia, PA 19106
(215) 592-4066

49/23

QUESTION PRESENTED

If the statutory prohibition against secondary boycotts in §8(b)(4)(ii)(B) of the National Labor Relations Act, 29 U.S.C. §158(b)(4)(ii)(B), extends to consumer handbilling by union members, does it violate the First Amendment as applied?

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS. . . . .	.ii
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS	1
STATEMENT OF THE CASE.	2
SUMMARY OF ARGUMENT.	5
ARGUMENT	8

I.	HANDBILLING IS A FULLY PROTECTED FORM OF EXPRESSION UNDER THE FIRST AMENDMENT	8
A.	Handbilling Represents Pure Speech In First Amendment Terms	8
B.	Handbilling Is Constitutional- ly Distinguishable From Picketing . . . . .	.10
II.	LABOR SPEECH ADVOCATING A CONSUMER BOYCOTT IS NOT A CATEGORY OF SPEECH SUBJECT TO PROHIBITION. . . . .	.20
A.	Labor Speech Is Entitled To The Same Constitutional Statutes As Other Fully Protected Expression. . . . .	.21

B.	Handbilling Urging A Secondary Boycott By Consumers Is Not A Type Of Coercive Speech Constitutionally Subject To Prohibition . . . . .	.26
C.	The Government's Broad Power To Regulate Economic Activity Does Not Justify Prohibiting This Handbilling. . . . .	.33

CONCLUSION

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<u>Abood v. Detroit Board of Education,</u> 431 U.S. 209 (1977). . . . .	.22
<u>Amalgamated Food Employee Union, Local 590 v. Logan Valley Plaza,</u> 391 U.S. 308 (1968). . . . .	.19
<u>Babbitt v. United Farm Workers National Union,</u> 442 U.S. 289 (1979). . . . .	.19
<u>Bakery Drivers v. Wohl,</u> 315 U.S. 769 (1942). . . . .	.16, 17
<u>Brandenburg v. Ohio,</u> 395 U.S. 444 (1969). . . . .	.16, 28, 30, 38

<u>Brotherhood of Railroad Trainmen v. Virginia,</u> 377 U.S. 1 (1964). . . . .	.23
<u>Cameron v. Johnson,</u> 390 U.S. 611 (1968). . . . .	.18
<u>Carey v. Brown,</u> 447 U.S. 445 (1980). . . . .	.20, 23, 32
<u>Carpenters v. Ritters Cafe,</u> 315 U.S. 722 (1942). . . . .	.15
<u>City Council v. Taxpayers for Vincent,</u> 466 U.S. 789 (1984). . . . .	.22
<u>Consolidated Edison v. Public Service Commission,</u> 447 U.S. 530 (1980).	9
<u>DeBartolo Corp. v. NLRB,</u> 463 U.S. 147 (1983).	1, 4 13
<u>Heffron v. Int'l. Society for Krishna Consciousness,</u> 452 U.S. 640 (1981).	9
<u>Hudgens v. NLRB,</u> 424 U.S. 507 (1976). . . . .	.19
<u>Hughes v. Superior Court,</u> 339 U.S. 460 (1950). . . . .	.15, 16, 17
<u>International Brotherhood of Teamsters, Local 695 v. Vogt,</u> 354 U.S. 284 (1957). . . . .	.17
<u>Jamison v. Texas,</u> 318 U.S. 413 (1943). . . . .	.8, 9

<u>Lovell v. Griffin,</u> 303 U.S. 444 (1938).	8
<u>NAACP v. Alabama,</u> 357 U.S. 499 (1958). . . . .	.21
<u>NAACP v. Claiborne Hardware,</u> 458 U.S. 886 (1982). . . . .	.16, 28, 30, 31 33, 34, 35
<u>NLRB v. Fruit and Vegetable Pickers and Warehousemen, Local 760,</u> 377 U.S. 58 (1964). . . . .	.12
<u>NLRB v. Gissel Packing Co.,</u> 395 U.S. 469 (1941). . . . .	.29
<u>NLRB v. Retail Store Employee Union,</u> 447 U.S. 607 (1980). . . . .	.passim
<u>NLRB v. Servette,</u> 377 U.S. 46 (1964). . . . .	.13
<u>NLRB v. Virginia Electric & Power Co.,</u> 314 U.S. 469 (1941). . . . .	.29
<u>Organization for a Better Austin v. Keefe,</u> 402 U.S. 415 (1971).	8, 18, 28, 30, 31, 32
<u>Police Department v. Mosley,</u> 408 U.S. 92 (1972). . . . .	.20, 23, 26, 33
<u>Posadas de Puerto Rico Associates v. Tourism Company,</u> 106 S.Ct. 2968 (1986). . . . .	.25
<u>Schneider v. State,</u> 308 U.S. 147 (1939).	8

<u>State v. Robertson,</u> 293 Or. 420, 649 P.2d 596 (1982) . . . . .	.27
<u>Talley v. California,</u> 362 U.S. 60 (1960)	8
<u>Thornhill v. Alabama,</u> 310 U.S. 88 (1940) . . . . .	.21, 22, 33
<u>Time, Inc. v. Hill,</u> 385 U.S. 374 (1967). . . . .	.22
<u>United Mine Workers v. Illinois,</u> 387 U.S. 217 (1967). . . . .	.23
<u>Virginia State Bd. of Pharmacy</u> <u>v. Citizens Consumer Council,,</u> . . . . .	.24

Statutes

National Labor Relations Act	
§8(b)(4), 29 U.S.C. §158(b)(4). . . . .	.passim

Other Authorities

<u>Baker, The Scope of the First</u> <u>Amendment Freedom of Speech,</u> 25 U.C.L.A. 964 (1978) . . . . .	.28
<u>Cox, Strikers, Picketing and</u> <u>the Constitution,</u> 4 Vand.L.Rev. 574 (1951) . . . . .	.15

<u>Cox, The Influence of Mr. Justice</u> <u>Murphy on Labor Law, 48 Michigan</u> <u>L.Rev. 767 (1950).</u>	.15
<u>Dodd, Picketing and Free Speech:</u> <u>A Dissent, 56 Harv.L.Rev. 513 (1943)</u>	.15
<u>Emerson, The System of Freedom of</u> <u>Expression (1970).</u>	.18
<u>Greenawalt, Criminal Coercion and</u> <u>Freedom of Speech, 78 Northwestern</u> <u>L.Rev. 1081 (1983)</u>	.28
<u>Gregory, Labor and the Law</u>	.14
<u>Hellerstein, Picketing Legislation and</u> <u>the Courts, 10 N.C.L.Rev. 158 (1932)</u>	.15
<u>Pope, Labor and the Constitution: From</u> <u>Abolition to Deindustrialization,</u> 65 Texas L.Rev. 1071 (1987). . . . .	.10
<u>Teller, Picketing and Free Speech,</u> 56 Harv.L.Rev. 180 (1942). . . . .	.15

INTEREST OF AMICUS^{1/}

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members dedicated to defending the principles embodied in the Bill of Rights. In particular, the ACLU has long opposed efforts to restrict the free speech protections of the Constitution.

This case directly threatens rights of free speech. Invoking the labor laws, petitioner seeks to prohibit what this Court has described as "an entirely peaceful and orderly distribution of a written message" DeBartolo Corp. v. NLRB ("DeBartolo I"), 463 U.S. 147, 157 (1983). Because the ACLU believes that

^{1/} The parties have consented to the filing of this brief, as indicated by their letters of consent filed with the Clerk of the Court.

such speech is protected under the First Amendment, we submit this brief in support of the judgment below.

STATEMENT OF THE CASE

This case arose out of a dispute between the respondent union and H. J. High Construction Company, which had been retained to construct a department store in the shopping center owned and operated by petitioner DeBartolo Corporation. As a result of this dispute, the union passed out handbills urging a consumer boycott of businesses located in petitioner's shopping center. Petitioner then filed an unfair labor practice charge with the National Labor Relations Board.

The National Labor Relations Act makes it an unfair labor practice "to threaten, coerce or restrain any person engaged in

commerce . . . where . . . an object thereof is . . . forcing or requiring any person to cease . . . dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person" 29 U.S.C. §158(b)(4)(ii). A proviso to the statute makes clear that this prohibition on behavior that threatens, coerces or restrains does not apply to "publicity, other than picketing, for the purpose of truthfully advising the public, including consumers . . . that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer" 29 U.S.C. §158(b)(4).

At an early stage in this litigation, this Court unanimously reversed the decision of the NLRB and the Court of Appeals,

and found that the publicity proviso does not apply here because the businesses in the shopping center do not "distribute" any product of the contractor. DeBartolo I, 463 U.S. 147 (1983), reversing 662 F.2d 294 (4th Cir. 1981). On remand, the Board found that the union "coerced" mall tenants by distributing the consumer-oriented handbills. The Court of Appeals granted the union's petition for review and denied enforcement of the order of the Board. Without reaching the serious constitutional issue raised by the Board's decision, the Court of Appeals held that nonpicketing labor publicity was not coercive conduct prohibited by §8(b)(4)(ii)(B). Florida Gulf Coast Building and Construction Trades Council v. NLRB, 796 F.2d 1328 (11th Cir. 1986), cert. granted, Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and

Construction Trades Council and NLRB, 107 S.Ct. 3182 (1987).

SUMMARY OF ARGUMENT

Section 8(b)(4)(ii)(B) of the National Labor Relations Act, 29 U.S.C. §158(b)(4)(ii)(B), prohibits secondary boycotts if they are accomplished by means that "threaten, coerce, or restrain." As the court below properly found, neither the language nor the legislative history of this provision supports its application to peaceful leafletting intended to encourage a consumer boycott. Florida Gulf Coast Building and Construction Trades Council v. NLRB, 796 F.2d 1328 (11th Cir. 1986).

We therefore adopt, without repeating, respondent's argument that the statute at issue simply does not apply to the facts of this case. If this Court were to find that

the statute does apply, it is unconstitutional. None of this Court's decisions have ever held that peaceful handbilling (or leafletting) of consumers can be prohibited.

This Court has stressed the "coercive" impact of a picket line in upholding restraints on secondary boycotts. Handbilling, however, is not a "coercive" activity; its power derives solely from the content of its message, which cannot be regulated under the First Amendment. This core principle of modern First Amendment law does not disappear merely because the handbilling occurs in the context of a labor dispute.

Nor does the content of the expression -- labor speech urging that consumers engage in a lawful boycott -- justify a prohibition of the handbilling. Labor

speech qua speech is fully protected by the First Amendment. Whatever limits might be placed on truly "coercive" speech, in a labor context or otherwise, union handbills that merely urge consumers to engage in lawful activities have none of the constitutionally relevant elements of coercion that might support governmental regulation.

ARGUMENT

I. HANDBILLING IS A FULLY PROTECTED FORM OF EXPRESSION UNDER THE FIRST AMENDMENT

A. Handbilling Represents Pure Speech In First Amendment Terms

Handbilling has consistently been characterized in this Court's decisions as a fully protected form of speech at the core of the First Amendment. See, e.g., Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); Talley v. California, 362 U.S. 60, 63-64 (1960); Jamison v. Texas, 318 U.S. 413, 416 (1943); Schneider v. State, 308 U.S. 147, 164 (1939); Lovell v. Griffin, 303 U.S. 444, 451 (1938). Censorship "which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees." Schneider, 308 U.S. 147, 164

(1939). Accordingly, "one who is rightfully on a street . . . carries with him there as elsewhere the constitutional right to express his views in an orderly fashion . . . by handbills and literature as well as by the spoken word." Jamison v. Texas, 318 U.S. 413, 416 (1943).

In specific circumstances, of course, the state can regulate the time, place and manner of leafletting. See Heffron v. Int'l Society for Krishna Consciousness, 452 U.S. 640 (1981). However, a valid time, place and manner regulation must be content-neutral and must leave ample, alternative channels for communication. See Consolidated Edison v. Public Service Commission, 447 U.S. 530, 535-36 (1980).

Here, the proposed prohibition of the union's handbilling is neither content-neutral nor geographically restricted. To

the contrary, it can and must be seen as a frontal assault on a form of expression that has traditionally received the fullest protection of the First Amendment.

B. Handbilling Is Constitutionally Distinguishable From Picketing

Petitioner's claim that the handbilling in this case can be constitutionally prohibited relies for authority on a line of cases from this Court upholding limited regulation of labor picketing.^{2/} See e.g. NLRB v. Retail Stores Employee Union ("Safeco"), 447 U.S. 607 (1980).

^{2/} The premise that union picketing and other union associational activity should receive less First Amendment protection than leafletting or less protection than other political demonstrations has been subject to increasing academic criticism. See Pope, Labor and the Constitution: From Abolition to Deindustrialization, 65 Texas L. Rev. 1071 (1987) (and sources cited at 1075-76 n.35 therein). This case, however, involves only peaceful leafletting and therefore does not raise those larger questions.

Indeed, petitioner argues that handbilling can be "as coercive, if not more coercive, than picketing." Petitioner's Brief at 28 n.21. Fairly read, the decisions cited by petitioner do not support the result that petitioner now urges. Rather, those decisions rest on a view of labor picketing as an amalgam of speech and conduct that is readily distinguishable from this Court's approach to the sort of handbilling at issue in this case.

The difference in this Court's approach to picketing and handbilling was recently summarized by Justice Stevens in his concurring opinion in Safeco, 447 U.S. 607, 618-19 (1980):

Like so many other kinds of expression, picketing is a mixture of conduct and communication. In the labor context, it is the conduct element rather than the particular idea being expressed that often provides the most persuasive deterrent to third persons about to enter a

business establishment
Indeed, no doubt the principal reason why handbills containing the same message are so much less effective than labor picketing is that the former depend entirely on the persuasive force of the idea.

The statutory ban [on secondary picketing] . . . offsets only that aspect of the union's efforts to communicate its views that call for an automatic response to a signal rather than a reasoned response to an idea.

Indeed, the statutory ban on secondary boycotts in §8(b)(4)(ii)(B) explicitly responds to Congress' understanding of a constitutional distinction between picketing and handbilling. Thus, Congress clarified the limited reach of its prohibitory language by adding a proviso that permits "truthful publicity, other than picketing," in most common circumstances. See 29 U.S.C. §158(b)(4).

As this Court explained in NLRB v. Fruit and Vegetable Pickers and Warehouse-

men, Local 760 ("Tree Fruits"), 377 U.S. 58, 70-71 (1964):

. . . the Senate Conferees' constitutional doubts led Congress to authorize publicity other than picketing which persuades the customers of a secondary employer to stop all trading with him On the other hand, picketing which persuades the customers of a secondary employer to stop all trading with him was . . . to be barred.^{3/}

^{3/} In DeBartolo I, supra, this Court ruled that the proviso was inapplicable to the present case because the advocated boycott was directed at businesses that did not "distribute" "a product or products" of the employer involved in the primary labor dispute. Nevertheless, the existence of the proviso demonstrates an unmistakable legislative sensitivity to the difference between picketing and leafletting — and there is no indication that Congress ever considered a situation where the proviso would not apply and, therefore, where handbilling would be prohibited.

Furthermore, there is at least some reason to believe that when the proviso is inapplicable, the general prohibition against secondary boycotts should also be inapplicable. The apparent symmetry between the proviso and the underlying prohibition on secondary boycotts has been noted by this Court: "There is nothing in the legislative history which suggests that the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception . . ." NLRB v. Servette, 377 (continued...)

In drawing a distinction between picketing and handbilling, both Congress and this Court have recognized the powerful, history-laden meaning of a picket line, with the display of loyalties involved in crossing or not crossing, which has led the Court to characterize picketing as a form of conduct unlike the expression of views, or even the call for support, involved in handbilling.

Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word. See Gregory, *Labor and the Law*

3/ (...continued)

U.S. 46, 55 (1964), quoted in DeBartolo I, 463 U.S. at 155, supra. But see Florida Gulf Coast Building and Construction Trades Council, 796 F.2d at 1336 n.8.

346-348 (rev.ed. 1949); Teller, Picketing and Free Speech, 56 Harv.L.Rev. 180, 200, 202 (1942); Dodd, Picketing and Free Speech: A Dissent, 56 Harv.L.Rev. 513, 517 (1943); Hellerstein, Picketing Legislation and the Courts, 10 N.C.L.Rev. 158, 186, 187, n.135 (1932).

Hughes v. Superior Court, 339 U.S. 460, 465 (1950).^{4/}

The issue in Hughes was whether New York could constitutionally prohibit a civil rights picket line advocating the hiring of minority employees by businesses

4/ Only with difficulty can this rationale be applied to labor picketing directed at consumers as opposed to other workers. Consumers certainly are not subject to the same discipline as organized workers. Cf. Carpenters v. Ritters Cafe, 315 U.S. 722 (1942) (secondary picketing caused walkout by cafe's employees and stopped deliveries by truck drivers) with Safeco, 447 U.S. 607 (picketing aimed solely at consumers). See Cox, Strikers, Picketing and the Constitution, 4 Vand.L.Rev. 574, 593-4 (1951) and Cox, The Influence of Mr. Justice Murphy on Labor Law, 48 Michigan L.Rev. 767, 788-89 (1950) (arguing for different treatment of "publicity" picketing aimed at consumer and "signal" picketing aimed at other union members). Nevertheless, this case does not raise the issue of when picketing should be protected.

located within the minority community. Given the Court's willingness to uphold the prohibition on nonlabor picketing in Hughes, its simultaneous assumption that the "distribution of circulars" could not be prohibited highlights the distinction between picketing and handbilling that this Court has repeatedly drawn.^{5/}

This Court's treatment of the labor picket line as conduct, because it amounts to a signal that triggers an economic chain reaction by others in the work force, derives from a frequently quoted concurring opinion by Justice Douglas:

Picketing by an organized group is more than free speech, since it in-

^{5/} Although this Court distinguished rather than overruled Hughes in NAACP v. Claiborne Hardware, 458 U.S. 886, 915 n.49 (1982), the assumption in Hughes that picketing could be prohibited because it advocated an "illegal" object is of questionable validity under Brandenburg v. Ohio, 395 U.S. 444 (1969).

volves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation.

Bakery Drivers v. Wohl, 315 U.S. 769, 776-77 (1942) (Douglas, J., concurring), relied upon in, e.g., Safeco, 447 U.S. at 618-19 (Stevens, J., concurring in part and concurring in the judgment); International Brotherhood of Teamsters, Local 695 v. Vogt, 354 U.S. 284, 289 (1957); Hughes v. Superior Court, supra, 339 U.S. at 464-65.

Neither justification articulated by Justice Douglas in Wohl applies to the sort of peaceful handbilling at issue in this case. First, the physical presence of a handbiller is different than the physical presence of a patrolling picket line. Various physical disruptions, ranging from actual violence to obstruction of passage-

ways, which on occasion have been associated with picketing,^{6/} seldom occur in the context of handbilling.

Thus, in Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), this Court struck down a state court injunction against leafletting the residential neighborhood of a real estate broker after noting that "[t]here was no evidence of picketing." Id. at 417. Indeed, if the physical presence of a handbiller were enough to justify regulation of handbilling as conduct, then many, if not all, of this Court's handbilling decisions during the past half-century would be wrongly decided.

Second, the culturally established "signalling" aspect of a labor picket line

^{6/} Cameron v. Johnson, 390 U.S. 611 (1968); T. Emerson, The System of Freedom of Expression 446 (1970) ("picketing that involves violence or undue physical obstruction must also be classified as action").

has no counterpart in the communication of a handbill. Although differently phrased in different opinions, the Court has characterized labor picketing as producing an "automatic response" from those confronting the picket line. E.g., Safeco, supra, 447 U.S. at 619. By contrast, the Court has consistently described the impact of a handbill as depending upon "the reasoned response to an idea." Id.

Accordingly, this Court has consistently found "that, for First Amendment purposes, picketing is qualitatively 'different from other modes of communication.'" Babbitt v. United Farm Workers National Union, 442 U.S. 289, 311 n.17 (1979) (citations omitted). In particular, this Court has noted "that picketing involves elements of both speech and conduct . . . and . . . because of this

intermingling of protected and unprotected elements, picketing can be subjected to controls that would not be constitutionally permissible in the case of pure speech."

Amalgamated Food Employee Union, Local 590 v. Logan Valley Plaza, 391 U.S. 308, 313 (1968) (citations omitted), reversed on other grounds, Hudgens v. NLRB, 424 U.S. 507 (1976).

II. LABOR SPEECH ADVOCATING A
CONSUMER BOYCOTT IS NOT A
CATEGORY OF SPEECH SUBJECT TO
PROHIBITION

Once speech is deemed protected by the First Amendment, the government is generally barred from enforcing differential rules based on content. Carey v. Brown, 447 U.S. 455 (1980); Police Department v. Mosley, 408 U.S. 92 (1972). The government acknowledges this principle but argues that it should not apply to labor speech. The

government's argument is unsupported by this Court's decisions and, if accepted, would effectively swallow the rule of content-neutrality.

A. Labor Speech Is Entitled To The Same
Constitutional Status As Other Fully
Protected Expression

This Court's decision in Thornhill v. Alabama, 310 U.S. 88, 102-04 (1940), made clear a proposition accepted ever since: that speech concerning industrial disputes is fully protected by the First Amendment. Basic First Amendment premises do not support the government's attempt to create a broad amorphous category of labor speech which it would accord diluted protection. As this Court observed in NAACP v. Alabama, 357 U.S. 499, 460 (1958), "it is immaterial whether the beliefs sought to be advanced . . . pertain to political, economic,

religious, or cultural matters." See also Abood v. Detroit Board of Education, 431 U.S. 209, 231 (1977). "The guarantees for free speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government." Time, Inc. v. Hill, 385 U.S. 374, 388 (1967).

Thus, the Court has emphasized that "[e]ven though political speech is entitled to the fullest possible measure of constitutional protection, there are a host of other communications that command the same respect." City Council v. Taxpayers for Vincent, 466 U.S. 789, 816 (1984) (emphasis added). The rationale for this all-embracing view of the First Amendment was articulated in Thornhill, 310 U.S. at 102: "Freedom of discussion, if it would fulfill its historic function in this nation, must

embrace all issues about which information is needed or appropriate to enable [union] members to cope with the exigencies of their period."

Indeed, the basis for this Court's restrictions on content discrimination is the recognition that the First Amendment protects economic, religious and cultural speech as fully as political speech. See, e.g., Carey v. Brown, supra; Police Department v. Mosley, supra. As the Court noted in a related context, "the Constitution protects the associational rights of the members of the union precisely as it does those of the NAACP." Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964).^{7/}

^{7/} See also United Mine Workers v. Illinois, 387 U.S. 217 (1967) (recognizing First Amendment associational rights to contract with attorney relative to purely private disputes).

The government's attempt to regulate speech that arises in the context of a labor dispute relies primarily on a misplaced analogy to commercial speech. To be sure, in Virginia State Bd. Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), this Court analogized commercial speech both to labor speech, id. at 762-3, as well as political speech and speech of general public interest, id. at 764-65, arguing that commercial speech may serve the goal of "enlighten[ing] public decisionmaking in a democracy." Id. at 765.

But the Court offered this analogy to justify greater protection for commercial speech -- not to diminish protection for labor speech. Whatever the rationale for greater or lesser protection of speech related merely to commercial transactions (usually speech between strangers related

to the limited purpose of inducing a purchase of a good or service), and whatever the present state of the law concerning commercial speech, see Posadas de Puerto Rico Associates v. Tourism Company, 106 S.Ct. 2968 (1986), these analogies are hardly a basis to restrict labor speech.

In contrast to commercial advertisements, labor speech relates to the central economic, social, and political structures of people's work life -- speech that is central to their self-realization and self-government, which is at the heart of this Court's conception of the First Amendment. It is precisely "[t]o permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, [that] our people are guaranteed the right to express any thought, free from government censorship." Police Department

v. Mosley, 408 U.S. at 95-96. Thus, whenever addressed by this Court, labor speech has been treated as fully within the scope of the First Amendment.

B. Handbilling Urging A Secondary Boycott By Consumers Is Not A Type Of Coercive Speech Constitutionally Subject To Prohibition

To say that labor speech is fully within the rationale of First Amendment protection is not to deny that employee-employer relations may involve the opportunity for coercion in certain circumstances. However, even if some category of "coercive" speech is subject to prohibition, the handbilling at issue here -- involving speech that is central to many people's concern with self-determination and self-realization -- is entitled to full constitutional protection.

Certainly, a legislative determination that speech is "coercive" does not and cannot end the constitutional inquiry.^{8/} See, e.g., State v. Robertson, 293 Or. 420, 649 P.2d 596 (1982) (Linde, J.) (illegal coercion statute unconstitutionally overbroad under state constitutional protection of freedom of speech). Either the constitutionally relevant category of coercive speech must be narrowly defined in a manner that would not include this speech,^{9/} or

^{8/} The applicable statute is premised on the notion that Congress can protect "neutral employers, employees, and consumers . . . from coerced participation in industrial strife." Safeco, 447 U.S. at 618 (Blackmun, J., concurring in part and concurring in the result). But as the court below noted, there is simply no evidence that Congress considered consumer-oriented handbilling to be coercive. 796 F.2d at 1340 and 1340 n.14.

^{9/} Commentators who argue that coercive speech is unprotected emphasize that the constitutionally relevant concept of coercion must be narrowly limited. A strict conception of coercion would include, for example, blackmail as a prohibitable type of coercive speech but would not

(continued...)

some "coercive" speech, including this consumer-oriented handbilling, must be protected.

Crucial to the distinction between protected and unprotected "coercive" speech is how the coercive effect is achieved. Influence on listeners or on third parties that results from the listeners being persuaded by a speaker, even persuaded to action, does not justify regulating the speaker. See Brandenburg v. Ohio, 395 U.S. 444 (1969).

In the context of this particular case, neither the union handbiller's communication nor a boycottter's decision not

9/ (...continued)
include the expression involved in Claiborne Hardware, Keefe, or this case. See, e.g., Greenawalt, Criminal Coercion and Freedom of Speech, 78 Northwestern L.Rev. 1081 (1983); Baker, The Scope of the First Amendment Freedom of Speech, 25 U.C.L.A. 964, 998-1004 (1978).

to buy is the sort of coercion that can be constitutionally prohibited. A business has no right to expect a consumer to trade with it and the law cannot make such a refusal to trade illegal merely because the refusal was encouraged by someone's speech. Moreover, any category of coercive speech subject to prohibition must refer to coercion of the listener by the speaker.^{10/} If it is only the listener's acts that are coercive, the law must only outlaw those

^{10/} The only cases cited by petitioner for the contrary proposition in fact support this narrow view of coercion. Petitioner's Brief at 28-29. For example, in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), the Court carefully distinguished between an employer's right to communicate with his employees and the improper use of threats. See also NLRB v. Virginia Electric & Power Co., 314 U.S. 469 (1941) (remanding to determine whether speech had been coercive). In both cases, the Court's concern was with whether the employer's communications with the employees were coercive of the employee. Moreover, contrary to the petitioner's argument, the speaker's use of a "conduit" to threaten the ultimate recipient of the message is consistent with the requirement that the speaker's coercion be directed to the listener.

acts and, unless the speaker and listener are acting in concert, the speaker's communications should be analyzed under the test in Brandenburg v. Ohio, supra.

Thus, this Court has repeatedly protected speech that has been described as "coercive" or as having a "coercive" impact. For example, in NAACP v. Claiborne Hardware, supra, the Court emphasized that "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." Id. at 910. Likewise, in Organization for a Better Austin v. Keefe, supra, the Court held that the "claim that the [leaflets] were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment." Id. at 419. As this Court explained in Claiborne Hardware, 458 U.S.

at 911: "In dissolving the prior restraint [in Keefe], the Court recognized that 'offensive' and 'coercive' speech was nevertheless protected by the First Amendment."

Under this Court's decisions, leaflets that appeal for support from an unorganized public cannot be deprived of First Amendment protection by attaching the label of "coercive" speech. Such handbilling achieves results only by successfully persuading listeners. If coercive at all, it is the type of "coercive" speech protected in both Claiborne Hardware and Keefe.

Accordingly, while handbills may "contain[] the same message" as picket signs, handbilling must be protected under the First Amendment because its influence "depend[s] entirely on the persuasive force of the idea." Safeco, 447 U.S. at 619

(Stevens, J., concurring in part and concurring in the result).

This Court has never sustained a ban on leafletting based on the message expressed in the leaflet except when the message was a prohibitable type of speech such as obscenity, or speech that creates a clear and present danger. See, e.g., Organization for a Better Austin v. Keefe, supra, 402 U.S. at 419. Insofar as §8(b)(4)(ii)(B) attempts to restrict consumer-oriented handbilling, it is a content-based speech regulation that must fall. See Carey v. Brown, 447 U.S. 455 (1980); Police Department v. Mosley, 408 U.S. 92 (1972).

C. The Government's Broad Power To Regulate Economic Activity Does Not Justify Prohibiting This Handbilling

In Claiborne Hardware, this Court upheld the right to engage in a boycott, relying in part on Thornhill v. Alabama, which protected labor picketing intended to promote a consumer boycott. 458 U.S. at 909. At the same time, this Court noted "the strong government interest in certain forms of economic regulation," and stated:

Secondary boycotts and picketing by labor unions may be prohibited, as part of "Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife." NLRB v. Retail Store Employees, 447 U.S. 607, 617-18 (Blackmun, J., concurring in part).

Claiborne Hardware, 458 U.S. at 912

(emphasis added).

The phrase "secondary boycott" in Claiborne Hardware cannot be read as a

talisman that eliminates all constitutional protection for speech. Indeed, we are aware of no case in which this Court upheld a prohibition on mere handbilling to encourage a boycott, primary or secondary.

If constitutionally appropriate at all, the prohibition on picketing to enforce secondary boycotts must rest on some coercive characteristic of labor's use of its organized power -- i.e., withdrawal of workers from, or refusal to make deliveries to or pickups from, the secondary business and, possibly, the use of pickets as threats to workers or consumers in order to stop the secondary business' trade. See, e.g., Safeco, 447 U.S. 607 (using pickets to enforce secondary consumer boycott). Neither this Court's holdings nor anything said by Congress suggests that employees' decisions as

consumers not to patronize offending businesses, or their urging family or friends or the public to do likewise, is impermissible.

Presumably, the public has a right to boycott businesses that are in some way connected with employers involved in labor disputes, and may have a political and social interest in doing so. From the political and social perspective of the public, these boycotts may be no different than boycotts of businesses for civil rights or environmental or other reasons. If the public has the right to boycott for these reasons, see NAACP v. Claiborne Hardware, supra, surely the worker has the right to communicate these reasons to the public.

Nor does Safeco justify regulation of the handbilling at issue here. The

government suggests that "[a]ll six Justices who reached the First Amendment question" in Safeco agreed that the regulation was justified by "[t]he government's interest in restricting a union's call for a total consumer boycott of a neutral secondary employer." NLRB Brief at 42 (emphasis added). However, this characterization of Safeco omits Justice Blackmun's crucial reference to "coercion". If adopted, the government's interpretation of Safeco would permit the government to prohibit expression that is central to the speaker's social, economic and political concerns, and that merely urges that people engage in lawful action.

In fact, the relevant language from Safeco identifies the government's interest to be the protection of "neutral employers, employees, and consumers to

remain free from coerced participation in industrial strife." 447 U.S. at 617-18 (Blackmun, J., concurring in part and concurring in the judgment) (emphasis added). Secondary pickets arguably may be treated as coercive for reasons already discussed. See Point IB supra. But, as Justice Blackmun recognized, preventing such coercion must be the extent of the government's legitimate interest if Safeco is to remain consistent with First Amendment principles.

At a minimum, the First Amendment must protect handbilling that merely urges action in which the listener has a right to engage. This speech cannot be treated as coercive of the listener. Even if the consumer's pressure on the secondary business could be in some sense "coercive" for purposes of the statute, the consumer's

legal activity cannot be a basis for viewing the union's expression as coercive of anyone.

Finally, even if secondary consumer boycotting by either workers or the public could be made illegal, the First Amendment protects the right of workers to advocate such boycotts. Brandenburg v. Ohio, supra. Here, of course, any response by consumers to the union's handbills was entirely lawful, as even the government concedes. NLRB Brief at 41. A fortiori, the union's handbills cannot be proscribed under the First Amendment.

CONCLUSION

For the reasons stated herein, the judgment below should be affirmed. If Congress intended to ban the consumer-oriented handbilling involved in this case when it enacted §8(b)(4)(ii)(B) of the National Labor Relations Act, the statute is unconstitutional as applied in this case.

Respectfully submitted,

JOHN A. POWELL
HELEN HERSHKOFF
STEVEN R. SHAPIRO
C. EDWIN BAKER
(Counsel of Record)
American Civil Liberties
Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Eric B. Schnurer
617 Pine Street
Philadelphia, PA 19106
(215) 592-4066

Robert A. Bush
Christopher D. Cameron
Ira L. Gottlieb
Taylor, Roth, Bush & Geffner
617 South Olive Street
Suite 1100
Los Angeles, CA 90014
(213) 623-8000

October 29, 1987